

# ADVERTISING INTRUSION: ASSAULT ON THE SENSES, TRESPASS ON THE MIND—A REMEDY THROUGH SEPARATION

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## I. THE DIMENSIONS OF THE PROBLEM

### A. *The Utility of Advertising*

Since time immemorial, man has communicated with his fellow man concerning what was available for sale or exchange, and presumably man has yielded to the temptation to accentuate the positive qualities of his own wares. There is no use, and no sense, denying that commercial communications play a role in keeping buyers informed on what is on the market and in stimulating interest in the material wealth which our mass production economy churns out with regularity.<sup>1</sup>

While advertising is here to stay, and has a proper place in our economic system, the potential excesses<sup>2</sup> in advertising conflict with the public interest in several areas.

### B. *Deceptive Advertising and Its Cultural Effect*

Deceptive advertising constitutes commercial fraud upon the

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<sup>1</sup> See Allport, *Advertising In Our Society*, in HANDBOOK OF ADVERTISING MANAGEMENT 1-11 (R. Barton ed. 1970); T. GARRETT, AN INTRODUCTION TO SOME ETHICAL PROBLEMS OF MODERN AMERICAN ADVERTISING 11-13, 17-27 (1961); C. SANDAGE & V. FRYBURGER, ADVERTISING THEORY AND PRACTICE 41-46 (7th ed. 1967). See also *Ford Motor Co. v. FTC*, 120 F.2d 175 (D.C. Cir.), cert. denied 314 U.S. 668 (1941).

For a somewhat overstated summary of the utility of advertising, see Foreword by Commerce Secretary Hodges, in UNITED STATES DEPT. OF COMMERCE, SELF-REGULATION IN ADVERTISING (1964) to the effect that:

In a free enterprise society as highly developed as ours, advertising plays a critical role. It is through advertising that we learn about the continuous parade of new products and services which American ingenuity generates. Advertising makes possible mass production and mass consumption through mass marketing. It is a vital instrument of our whole competitive process.

<sup>2</sup> That advertising excesses are serious and that there is need for more information in aid of regulation are the premises of a bill introduced by Senator Moss on May 3, 1971 (S. 1753, 92nd Cong., 1st Sess.) to establish a "National Institute of Advertising, Marketing and Society."

In Section 2(a), it is stated that "(1) there is increasing concern in the United States . . . over the . . . psychological and social costs of mass marketing and advertising techniques."

For a detailed explanation of why such an Institute is needed, see statement of Professor John A. Howard of Columbia University, *Hearings on S. 1753 Before the Senate Comm. on Commerce*, 92nd Cong., 2d Sess., 275-79 (1972).

public and is detrimental both to consumers and to competitors. Most of the regulatory effort in the United States has been aimed at this kind of advertising and this remains the battleground where the thin line between permissible puffery and misrepresentation is drawn, and where new regulatory techniques such as substantiation of claims and counter-advertising are hotly debated.<sup>3</sup> The central, if not exclusive, concern here is with particular advertising content; that is, with the substance rather than with the form or frequency of the message.

Another fundamental criticism of advertising relates to its effect as a whole upon the public mind and patterns of consumption. It has been charged that advertising pushes a philosophy of crass materialism and distorts the value system of our society, resulting in people measuring achievement and success in terms of acquisitions,<sup>4</sup> that advertising causes people to buy things that they do not need,<sup>5</sup> and that ultimately advertising leads to a misallocation of our resources at the expense of the public sector of our economy.<sup>6</sup> There is also little doubt that advertising as such constitutes a cost of distribution eventually borne by the consumer and, in the view of the critics, this cost is mostly a waste.<sup>7</sup> There is some substantive merit in these arguments

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<sup>3</sup> The substantiation requirements for advertising claims and the imposition of corrective advertising obligations constitute the most conspicuous examples of FTC activism within the deception framework. See Loevinger, *The Politics of Advertising*, 15 WM. & MARY L. REV. 1 (1973); Thain, *Advertising Regulation: The Contemporary FTC Approach* 1 FORD. URB. L.J. 349, 552-54, 386-90 (1973); Note "Corrective Advertising": Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971); and Note, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972). On the FCC role in this area, see Note, *A Word Against Our Sponsor: Fairness Doctrine and Advertising*, 60 CALIF. L. REV. 1416-50 (1972).

<sup>4</sup> Jones, *The Cultural and Social Impact of Advertising on American Society*, 1970 L. & SOC. ORDER 379, 383-88 (1970); and H. MARCUSE, *ONE DIMENSIONAL MAN* 57-58 (1969). See also Allport, *supra* note 1, at 1-10; T. GARRETT, *supra* note 1, at 13; BUSINESS WEEK, June 10, 1972, at 46. Cf. Florenne, *Quelle Liberté? Publicité, Consommation et Passions*, Le Monde, July 10, 1971, at 7, cols. 3-5.

<sup>5</sup> R. BAUER & S. GREYSER, *ADVERTISING IN AMERICA: THE CONSUMER VIEW* 103 (1968), report that 65% of their sample believe that "advertising often persuades people to buy things they shouldn't buy." Cf. A. TOYNBEE, *AMERICA AND THE WORLD REVOLUTION* 144-45 (1966).

<sup>6</sup> Cf. J. GALBRAITH, *THE NEW INDUSTRIAL STATE*, *passim* (1967).

<sup>7</sup> See, e.g. G. BACH, *ECONOMICS* 431-39 (5th ed. 1966); K. BOULDING, *ECONOMIC ANALYSIS: MICROECONOMICS* 513-14 (4th ed. 1966); S. CHASE, *THE TRAGEDY OF WASTE* 112 (1958); W. COCHRANE & C. BELL, *THE ECONOMICS OF CONSUMPTION* 386 (1956); K. KAPP, *THE SOCIAL COSTS OF PRIVATE ENTERPRISE* 190-95 (1950). See also Kotler, Allvine & Bloom, *It's Time to Cut Down on Advertising Waste*, 1972-73 BUS. & SOC'Y REV. No. 4, at 9-18. For a summary of the counterarguments, see J. BACKMAN, *ADVERTISING AND COMPETITION* 28-34 (1967).

It appears that the public is evenly split on whether advertising is, on balance, wasteful. R. BAUER & S. GREYSER, *supra* note 5, at 102-03. Whether or not advertising in general is wasteful, most of the so-called "tug-of-war" ads which are aimed primarily at the switching of brands by consumers do not contribute much to GNP growth and the role of such ads in quality

and their relevance is more marked now that the assumptions of overabundance are increasingly subject to question and inflation becomes a way of life.<sup>8</sup> To date, the impact of these arguments, however, has not been significant. These arguments raise the basic question of whether the state of our culture and the basic economic preferences of the public are properly subject to governmental control, at least in the form of a prohibition or content regulation of non-conforming communication of any kind. A recent major effort by ACT, a Boston-based parents group, and others, to cause the Federal Trade Commission and the Federal Communications Commission to ban, or severely limit, commercials on children's television programs<sup>9</sup> falls within this second category of criticism in that it focuses primarily upon the undesirable impact of commercials upon the children's minds. There is also an overtone of deception here in the sense that the immaturity of the subjects opens the door to misleading impressions even in instances where the commercials do not contain misrepresentations as such.

The concern expressed over insidious techniques of advertising, e.g., subliminal commercials aimed below the level of conscious reception,<sup>10</sup> in part relates to considerations of deception and cultural effect. In addition, however, the concern reflects another element, namely that of unwanted intrusion, which leads us to a third major category of advertising excess — intrusion.

### C. *The Evils of Advertising Intrusion*

Most advertising in the United States today is presented in an intrusive manner upon audiences which have not expressed any desire to receive the advertising and which audiences are, in fact, captive. The average person is battered daily by thousands of commercials in the broadcast and print media, direct mailings, and outdoor signs;<sup>11</sup>

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improvement or efficiency through competition is at best marginal, at least when the products are essentially interchangeable. Most of television advertising (beverages—soft drinks, beer; toiletries—soaps, detergents, toothpastes, mouthwashes, shaving goods; cereals; non-prescription drugs; gasoline and automobiles) falls within this category. This kind of advertising is also counterproductive in the sense that it is biasing industrial research toward the creation of products that yield a demonstrable, surface improvement at the expense of real change or cost-saving. See M. MAYER, *ABOUT TELEVISION* 391 (1972).

<sup>8</sup> See authorities cited at note 7, *supra*.

<sup>9</sup> See *infra* notes 161-168.

<sup>10</sup> See A. WESTIN, *PRIVACY AND FREEDOM* 279-97 (1970). On other techniques of increasing ad effectiveness through exploitation of the weaknesses of particular audiences, see, e.g., *Psychographics Are Billed as Newest Key to Effective Advertising*, Wall Street Journal, Aug. 12, 1971 at 1, col. 5.

<sup>11</sup> Fairfax Cone, the widely respected advertising man from Foote, Cone & Belding, reports "research shows that the average American is exposed to some 1600 advertising messages each day." Columbus (Ohio) Dispatch, Sept. 27, 1970, at 30, cols. 1-2. For a more conservative calculation, including a distinction between actual exposures and mere opportuni-

and he is left with no escape except withdrawal from society and internment in a camp of hermits. Innumerable visual and aural messages force themselves day in and day out upon the public.<sup>12</sup> For example, the most offending intruders of all, the television commercials, have increased in number at least 50% between 1964 and 1970 and total television commercials on an average evening have increased 41% between 1966 and 1970.<sup>13</sup> All sorts of new stratagems are being devised to make sure that we cannot evade the commercial pitch. Some magazines no longer isolate commercials from editorial content on the same page—ads are placed in the middle of a page or in checkerboard form or diagonally or in the shape of T, H, or Z.<sup>14</sup> Paperback books are being stuffed with commercials. In 1971, Benjamin Company of New York, representing seven paperback publishers, placed 62 million ad inserts, and a 30% increase was expected for 1972.<sup>15</sup> Advertisers are proposing to Nevada officials to replace the traditional slot machine cherries, lemons, and plums with tiny cigarette ads.<sup>16</sup> New York finally yielded to the pressure and is allowing advertisements on municipal trash cans.<sup>17</sup> In the first eight months of his life, a California infant received more than 2,000 pieces of unsolicited junk mail.<sup>18</sup> Selling by phone is expanding, which of course means that an increasing number of unsuspecting people will be jarred by sales calls in the intimacy of their homes.<sup>19</sup> The motion

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ties for exposure, see R. BAUER & S. GREYSER, *supra* note 5, at 173-75. David Ogilvy has stated that an average TV viewer is exposed to some 40,000 commercials a year. NEWSWEEK, Aug. 18, 1969, at 62, 66. Former HEW Secretary Robert Finch calculated that the average human being over his productive life span watches TV commercials for more hours than he ever spends in school. Address to Television Bureau of Advertisers, Washington, D.C., Oct. 21, 1969.

<sup>12</sup> See, e.g., Cohen, *Advertising Boom Starting Now; Will Go Five Years*, ADVERTISING AGE, Aug. 7, 1972, at 1. See also note 133, *infra*.

<sup>13</sup> Percentages relating to network television, according to Herbert Maneloveg, vice-president of Batten, Barton, Durstine & Osborn, Inc., an advertising agency, cited in *Boost in TV Commercials, and Complaints, Forces FCC to Air Issue With Networks*, Wall Street Journal, March 13, 1970, at 22, cols. 1-4. Foote, Cone & Belding report that in a recent (1973) prime-time network hour, they counted twenty pieces of non-program matter. See Wall Street Journal, Nov. 4, 1970, at 15, cols. 4-5.

It is noteworthy that the more public-spirited Group W stations (Westinghouse Broadcasting Company) recently resigned from the Television Code of the National Association of Broadcasters in protest over a Code revision which allowed commercial "piggy-backing," i.e., putting two or more commercials in a single commercial unit, usually one minute, thus increasing "clutter" 100%. *Group W Leaves N.A.B. Code Group*, N.Y. Times, Feb. 17, 1969, at 70, col. 3.

<sup>14</sup> Wall Street Journal, Oct. 29, 1970, at 1, col. 5.

<sup>15</sup> Wall Street Journal, April 13, 1972, at 1, col. 5.

<sup>16</sup> Wall Street Journal, Aug. 26, 1971, at 1, col. 5.

<sup>17</sup> N.Y. Times, Dec. 25, 1970, at 27, col. 2.

<sup>18</sup> *Junk Mail for Baby*, NEWSWEEK, May 15, 1972, at 107, cols. 2-3.

<sup>19</sup> On the dimensions of unsolicited telephone sales calls and on the uphill, frequently

picture theaters, which for some mysterious reason had managed to escape, are becoming infested with commercial "short subjects."<sup>20</sup> Advertisements banned in one medium take their vengeance through another—witness the shift of cigarette commercials from the broadcast to the print media.

If the present *laissez-faire* attitude toward intrusive advertising continues, there is virtually nothing to prevent the paragons of commercialism, who dominate the markets, from using their power to push commercials on us in every conceivable circumstance. Builders may retain advertising easements to use the walls of our living rooms for commercial posters with rights of access to change them every two weeks. TV and radio makers may build in their sets an automatic turning-on device which could be activated at the option of the advertisers at all hours of day and night.<sup>21</sup> Sonorous billboards and floating fragrances are a possibility.<sup>22</sup> There is no limit to what a fecund, well-financed imagination may produce to trample upon our mind in view of the wide-spread advertising philosophy that almost any impression is better than no impression at all.

There is little doubt that most people find intrusive advertising annoying and aggravating.<sup>23</sup> Probably the most unpopular form of intrusive advertising is the blaring soundtruck and most communities have regulated that type of advertising out of existence. Next comes

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unsuccessful, struggle to do something about it, see Note, *Unwanted Telephone Calls—A Legal Remedy?*, 1967 UTAH L. REV. 379, 381, 396-407; Note, *Assault Upon Solitude—A Remedy?*, 11 SANTA CLARA LAW. 109, 119-22 (1970). On the recent practices aiming at making "the telephone as much a medium of advertising as are newspapers, radios, TV, and bill boards," see *Selling by Phone is Ringing the Bell*, BUSINESS WEEK, Nov. 11, 1972, at 159-64.

<sup>20</sup> Daniels, *Show Films, Not Commercials*, Ohio St. Lantern, Feb. 1, 1974, at 9, cols. 3-5.

<sup>21</sup> The Pentagon plans wide-scale tests next month on a radio warning system it wants to put into your bedroom. The radio receiver listens silently to a government frequency and comes to life only when the military activates it with a special, coded signal.

Ohio St. Lantern, Jan. 23, 1973, at 5, cols. 1-3.

<sup>22</sup> Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1015 (1967).

<sup>23</sup> "[Advertising] and related activities involving selling are high among the sources of annoyance people mention spontaneously." R. BAUER & S. GREYSER, *supra* note 5, at 110. "We would expect . . . that proposals aimed at reducing the 'noise' of advertising—its intrusiveness, confusion, interruptiveness—would find the most public support. Such proposals, moreover, are hard ones to argue against from a 'common sense' point of view." *Id.* at 383.

Remarkably, young people are more annoyed by advertising than the older ones. *Id.* at 270. According to a 1972 survey conducted among 9000 advertising and marketing students from 177 schools, a substantial majority said that there is excessive advertising on the broadcast media and on billboards and 56% expressed support for more government regulation. *College Students Believe There Are Too Many Outdoor Broadcast Ads, Survey Finds*, ADVERTISING AGE, May 15, 1972 at 54.

the television and radio commercial which interrupts a program in order to make sure that the advertisement will not be missed. Whatever the public's opinion on television and advertising in general, a substantial majority of television viewers complain of the frequency and interruptiveness of commercials.<sup>24</sup> As aptly stated by a producer

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<sup>24</sup> In one of the most systematic recent studies of viewer attitudes toward television, G. STEINER, *THE PEOPLE LOOK AT TELEVISION* (1971), dissatisfaction with advertising practices, especially intrusion, surfaces quite strongly: 48% of the sample objected to the "timing" of commercials, with 21% complaining specifically about program interruptions. *Id.* at 209. In fact, interruptiveness was perceived as the most annoying aspect of commercials. *Id.* at 225. Many viewers considered commercials as "unselected, intrusive riders." *Id.* at 212. The intensity of the anti-commercial feeling is demonstrated by the fact that 63% found commercials "too long," 43% said that they would prefer TV without commercials, and 24% were willing to pay a small amount yearly if television could be free of commercials. *Id.* at 219. This corroborates the findings of a poll taken by the American Institute of Public Opinion in 1958 to the effect that 54% of the sample would prefer television without advertising while only 29% held the contrary view. R. BAUER & S. GREYSER *supra* note 5, at 263.

Steiner summarizes the viewer attitude toward commercials as follows:

Now about those commercials. I know they pay for the shows, and I appreciate that, but please don't allow the advertisers to interrupt at crucial points in the movies or in regular shows. In the first place, it makes me angry and probably backfires much of the time . . . . But even if it works, you shouldn't allow it.

STEINER, *supra* note 24, at 248. Annoyance and anger at commercials is spread in all segments of the sample and is not limited to the well-educated, wealthy, or highbrow. *Id.* at 223-24. Likewise, in their study of consumer attitudes about advertising in general, Bauer and Greyser conclude that no less than 40% of those who dislike advertising do so because of its intrusive nature. In addition, those who like advertising do so for its informative role and *despite* its intrusion. R. BAUER & S. GREYSER, *supra* note 5, at 133-34. When it comes to television commercials, public annoyance multiplies many times. "More intrusive and more interruptive, more fully personal, both the nature and content of television's advertisements have incurred the wrath of many." *Id.* at 238.

Another major report, this time by the Roper organization, B. ROPER, *A TEN-YEAR VIEW OF PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA 1959-1968* (1969), corroborates the Steiner findings. According to the report, 38% of the sample in 1968 had an unfavorable attitude toward most commercial practices. *Id.* at 23. Furthermore, 80% agreed that "there are far too many commercials on television" and 61% agreed that "they are usually too noisy and loud." *Id.* at 24. A 1972 study sponsored by the National Association of Broadcasters revealed that 69% of the sample would prefer television without commercials and 39% would support government control over commercials. *Public Wants More TV Without Ads, NAB-Backed Study Shows*, *ADVERTISING AGE*, Feb. 28, 1972, at 2. A Harris poll on television commissioned by LIFE in 1971 revealed that,

Commercials are a leading irritant. Almost everyone questioned complained that there are too many. A large majority of viewers are convinced that the sound level of commercials is higher than that of the program proper; they wish they could turn the commercials off . . . . [I]f disappointment with programming continues to rise, the day may come when excessive commercials could provide many viewers with an excuse for the final turn-off."

*But Do We Like What We Watch?*, LIFE, Sept. 10, 1971, at 43-44.

A substantial number of the viewer complaints with the FCC relate to broadcast overcommercialization. See *Wall Street Journal*, March 13, 1970, at 22, col. 1.

Television networks, such as NBC, agree that:

"most viewer complaints about commercials center on the content or style of certain

of television ads: "The television commercial is the most intrusive form of sell ever invented. It's a door-to-door selling with a key to the front door."<sup>25</sup> Then we have the billboard, the bulk of newspaper and magazine advertising, and some non-interruptive broadcast advertising. In these instances, the intrusion comes primarily from the adjacency of the commercial message to what one normally needs or wishes to see, in such a way that avoidance becomes difficult if not impossible.<sup>26</sup> The successful campaign in the 1960's against billboards mustered the overwhelming support of the public.<sup>27</sup> Finally, there is the direct-mail type of advertising and the handbill where the annoyance is connected with the cluttering up or littering of property, and where the intrusion upon the mind is minimal.

#### D. *Why Advertising Intrusion Escaped Regulation*

In view of the adverse public sentiment, why is it that so little has been done, except for soundtrucks, billboards and door-to-door solicitation, to stem the flood of intrusive commercial pollution, especially in the mass media? One reason is the helplessness of the public against the organized forces in our economy which treat our minds as fair game for commercial propaganda. Prolonged helplessness leads to apathy, numbness, habituation and finally to the development of a self-defense mechanism which automatically closes the mind to the offending ads. Another reason is that the public has an interest in commercial information. People do not necessarily object

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ads and on the number of interruptions.

*Id.* at col. 2.

<sup>25</sup> Charlton-Perrin, *How Not to Sell to Children on TV*, N.Y. Times, Aug. 22, 1971, § 3 at 17, col. 1. See also Tobin, *Spots Before Our Eyes*, SATURDAY REVIEW, Feb. 14, 1970, at 67-68.

<sup>26</sup> In 1972, the ad ratio in daily newspapers was no less than 62.6%. EDITOR & PUBLISHER, July 1, 1972, at 36.

<sup>27</sup> See, e.g., *Hearings on S. 963. Before a Subcomm. at the Senate Comm. on Public Works*, 85th Cong., 1st Sess. (1957) at 2. (Commerce Secretary Weeks: "widespread feeling throughout the country that advertising adjacent to the Interstate System should be restricted"), at 43 (Senator Neuberger: "high degree of unanimity which seems to exist among all those who do not have a direct economic stake in signboard advertising"), at 146 (Trendex News Poll: "2 out of 3 favor antibillboard bill"). See also, *Hearings on S. 1467, Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. (1967) at 45. (In an Ohio study, seventy-one percent of the motorists interviewed were opposed to commercial billboards.)

In 1971, the city council of Denver, Colo., adopted unanimously an ordinance banning intrusive signs from roadways and buildings. *The Sign Busters*, NEWSWEEK, June 7, 1971, at 25, cols. 2-3, at 26, col. 1. A number of students calling themselves "Midnight Skulkers" grew so impatient with the billboard blight in Michigan that they started a private crusade and began tearing down billboards in the dark of night. *Billboards: The Hard Search for America the Beautiful*, N.Y. Times, May 2, 1971, § 4, at 2, cols. 2-6.

to promotion so long as it is not forced upon them. Consequently, people do not frequently mind the ad as such, but only the intrusion. In addition, many people have been led to believe that without advertising there would be no free broadcast programs and therefore tolerate advertising excesses as the "price to pay" for such programs.<sup>28</sup>

Finally, the economic forces in our society, and Madison Avenue itself, have been able to brainwash the public into the adoration of GNP growth as if such growth were God-ordained. Such forces have also fostered the belief that GNP growth is not possible without advertising. Even if we were to accept GNP growth as a desirable goal<sup>29</sup> and to grant that advertising contributes to such growth,<sup>30</sup> it still does not follow that advertising should be totally sacrosanct. Assuming that we also recognize a public interest in freedom from unwanted intrusion, an adjustment and compromise is called for which would abate the commercial nuisance without eliminating legitimate ways of advertising and without necessarily limiting its total volume.<sup>31</sup> If the effectiveness of advertising is somewhat reduced in the balance, so be it. Another broad-gauge argument used in support of the commercial control of our media, namely that such support guarantees the media's independence from the government, has cer-

<sup>28</sup> See, e.g., G. STEINER, *supra* note 24, at 207, 218-19, where 75% of the sample responded affirmatively to the statement, "Commercials are a fair price to pay for the entertainment you get."

<sup>29</sup> For an overview of the position against unlimited growth, see *The Apostle of Anti-Growth*—E. J. Mishan, 1972-73 BUS. & SOC'Y REV. No. 4, at 4-8. For a major attack against the "one-dimensionality of economic reasoning about growth" and against "GNP Fetishism," see W. WEISKOPF, *ALIENATION AND ECONOMICS, passim* (1971). On the pro-growth argument, see T. GARRETT, *supra* note 1, at 27-34.

<sup>30</sup> J. BACKMAN, *ADVERTISING AND COMPETITION* 22-24 (1967). On the existing doubts on this score, see T. GARRETT, *supra* note 1, at 133-48. The "waste" argument is also of major significance here. See note 7, *supra*.

<sup>31</sup> The public appears quite aware of the need to strike a proper balance. In a recent survey, it is reported that

[t]here is strong general support for advertising, especially in its economic role, coupled with a good deal of criticism of how advertising impinges on individuals and how it is executed . . . . The public is critical of [advertising's] social aspects and questions the content and tone of advertisements themselves.

R. BAUER & S. GREYSER, *supra*, note 5 at 101, 110. More particularly:

[I]t seems that of the notions offered for not liking advertising the notion that it may be an *environmental pollutant* is suggested far more often than the idea that it may sometimes act as a malevolent economic instrument.

*Id.* at 135 (emphasis supplied).

The primary reasons people cite when categorizing an advertisement as annoying . . . relate to the *stimulus qualities* of the ad. Of a total of 138% of reasons given . . . 73% pertain to the inherent unpleasantness of the ad as an element in one's life space. Three kinds of reasons make up this 73%. The major one is intrusiveness (42%)

*Id.* at 211. (emphasis supplied). See also, *id.* at 218-20, 231, 233, 238.



tain merit<sup>32</sup> but again is not entirely on point. As will be demonstrated later, the abuses of intrusive advertising can be corrected without significantly affecting mass media revenues and certainly without ushering in government ownership or content control.

With the question narrowed to regulation of intrusive advertising, the proponents of total *laissez-faire* take the position that the public interest is not unduly invaded because there are sufficient built-in safeguards against advertising excesses and that, in any event, the viewer, listener, or reader always has the option of "switching off" unwanted advertising. But, in fact, the few available safeguards are not working and opting out without total exclusion from the media, is a grand illusion.<sup>33</sup>

#### E. *The Essence of the Problem*

Put bluntly, the omnipresence, pervasiveness, and unavoidability of advertising today in the United States constitutes a "growing message pollution,"<sup>34</sup> a monumental nuisance affecting the daily lives of all Americans. What we are faced with is essentially a takeover and branding of our minds in the interest of merchandising objectives. Failure to take some action about advertising has reached the dimensions of a scandal. It is time that we should be liberated from this state of commercial siege. In the pages that follow it will be demonstrated that there are no constitutional obstacles to a reasonable regulation of advertising in all media through legislation or administrative action, and that there are many techniques available, some quite simple, sensible, and drastic, which will excise most intrusion without interfering either with the general dissemination of advertising or its receipt by consenting adults.

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<sup>32</sup> There is another side to the argument, however, in that commercial broadcasting generates enormous pressures in the direction of blandness and triviality, and leads mostly to entertainment aimed at the lowest (or at least very low) common denominator. See, e.g., T. GARRETT, *supra* note 1, at 15-16; Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633 (1966); Denison, *Why Isn't Radio Better?*, HARPER'S, April 1934, at 576-86; Hinckle, *The Adman Who Hated Advertising: The Gospel According to Howard Gossage*, ATLANTIC, March 1974, at 67-72; *The TV Week That Is: Wasteland Blossoms In a Ratingless Week*, Wall Street Journal, April 23, 1970, at 1, col. 4. In addition, there are instances of excessive influence on the media in the direction of pro-business positions. C. SANDAGE & FRYBURGER, *supra* note 1, at 50-52. See also Farbstein to Seek Advertising Inquiry, N.Y. Times, July 30, 1970, at 37, col. 2. On balance, however, it would appear that private commercial control presents fewer problems and creates fewer dangers than outright government ownership or direct control. C. SANDAGE & V. FRYBURGER, *id.* at 52-53.

<sup>33</sup> See text at notes 95-102, *infra*.

<sup>34</sup> The phrase is Herber Maneloveg's, Vice President of Batten, Barton, Durstine and Osborn, Inc., an advertising agency. See Wall Street Journal, March 13, 1970, at 22, col. 2.

## II. THE CONSTITUTIONAL ASPECTS OF ADVERTISING REGULATION—FREEDOM OF SPEECH AND DUE PROCESS

### A. *Commercial-Content Advertising Enjoys No Significant Protection Under the First Amendment*

The proponents of advertising regulation can take comfort in the fact that commercial-content ads have been consistently held to be outside the pale of the first amendment. While most advertising undoubtedly constitutes "speech" in a literal sense, the inferior constitutional status of advertising has been capsulized by Judge Bazelon in the following language:

Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitations for public purposes like other business practices.<sup>35</sup>

Under this view, advertising is a mere tool in the merchandising process; here, advertising involves ideas of the market place rather than the market place of ideas.<sup>36</sup>

The case most frequently cited in support of the proposition that advertising enjoys no first amendment protection is *Valentine v. Chrestensen*.<sup>37</sup> In an earlier case, *Schneider v. State*,<sup>38</sup> the Supreme Court had warned that its holding invalidating a municipal ordinance which forbade the distribution of any literature should not be taken "as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires."<sup>39</sup> In *Valentine*, at issue was the validity of § 318 of the New York Sanitary Code which prohibited the distribution in the streets of "commercial and business advertising." Respondent attempted to evade this prohibition by printing on the other side of his commercial handbill a protest against the refusal of the City Dock Department to grant to him wharfage facilities. In reversing an injunction granted below

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<sup>35</sup> *Banzhaf v. FCC*, 405 F.2d 1082, 1101-2 (D.C. Cir. 1968).

<sup>36</sup> The conception of advertising as a "selling tool" is widely shared by members of the industry. See, e.g., C. SANDAGE & V. FRYBURGER, *supra* note 1, at 38-39; J. Blackman, *Advertising in the National Economy*, in HANDBOOK OF ADVERTISING MANAGEMENT, *supra* note 1, at 2-1.

<sup>37</sup> 316 U.S. 52 (1942).

<sup>38</sup> 308 U.S. 147 (1939).

<sup>39</sup> *Id.* at 165.

against police interference with the distribution, the Supreme Court used unequivocal language to deny first amendment protection to commercial speech even when combined with non-commercial matter. While recognizing that the streets are proper places for the exercise of the freedom of communicating information subject to state regulation in the public interest (which regulation, however, should not be unduly burdensome) the Court flatly stated that:

We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.<sup>40</sup>

Two subsequent Supreme Court cases involving first amendment protection of door-to-door solicitation or the dissemination of literature, carefully exempted commercial speech. In *Martin v. Struthers*,<sup>41</sup> it was noted that the ordinance "was not directly solely at commercial advertising."<sup>42</sup> In *Breard v. Alexandria*,<sup>43</sup> the Court emphasized that the first amendment argument was not open to "solicitors for gadgets or brushes,"<sup>44</sup> and even the two dissenters, Justices Black and Douglas, conceded that "of course [we] believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door selling pots."<sup>45</sup>

Whether or not one accepts the commercialization-by-association aspect of *Valentine*, at least in palpable evasion cases, its holding on the exclusion of "purely commercial advertising" remains solid law today insofar as commercial-content ads are concerned.<sup>46</sup>

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<sup>40</sup> 316 U.S. at 54.

<sup>41</sup> 319 U.S. 141 (1943).

<sup>42</sup> *Id.* at 142, n.1.

<sup>43</sup> 341 U.S. 622 (1951).

<sup>44</sup> *Id.* at 641.

<sup>45</sup> *Id.* at 650.

<sup>46</sup> For a more extensive discussion of the minimal constitutional protection of advertising in general and commercial-content ads in particular, see Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429-32 (1971); Note, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 183-90 (1971); Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1013-16, 1027-29, 1034-38 (1967); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1192, 1194-96, 1200-01 (1965). Historically, there is no indication that the framers of the Bill of Rights considered protecting commercial advertising. See Letter of the Continental Congress to the Inhabitants of Quebec, 1774, quoted in *Roth v. United States*, 354 U.S. 476, 484 (1957); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

What has happened, however, is that it became apparent that not all speech which has some connection with money changing hands should come under the *Valentine* exception. This explains why a number of federal cases refer to the "lesser" first amendment protection of commercial speech and also explains why the Court intimates that it has not spoken its final word on the subject.<sup>47</sup> The *Valentine* opinion was laconic and its anti-commercial holding could have been given sweeping effect beyond reason. Quite appropriately, subsequent cases accorded first amendment status to religious and other literature irrespective of whether it was distributed for free or for a price,<sup>48</sup> recognized that films shown in commercial theaters are entitled to full protection,<sup>49</sup> and held that a paid political ad deserves no lesser treatment than an editorial on the same subject.<sup>50</sup> Mr. Justice Douglas has also argued, without much success, that whether or not speech is affected by monetary considerations, profit motives,<sup>51</sup> or involves commercial issues,<sup>52</sup> such speech should enjoy the same status as all

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<sup>47</sup> "We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business." *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 44, n. 12 (1971) (Brennan, J.), citing *Valentine* and the other similar cases and contrasting them with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966). *Rosenbloom* involved the defamation of a public person.

<sup>48</sup> *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>49</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>50</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). On the right of access for paid political ads to publications involving state action, see *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970). The Supreme Court ruled against a direct right of access, dictated by the first amendment, to the broadcast media in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

<sup>51</sup> Mr. Justice Douglas concurring in *Cammarano v. United States*, 358 U.S. 498, 513-14 (1959). His reference to the *Valentine* ruling as "casual, almost offhand" and as not having "survived reflection" is to be understood in the same sense. *Id.* at 514.

<sup>52</sup> "The language of the First Amendment does not except speech directed at private economic decision making. Certainly such speech could not be regarded as less important than political expression." Mr. Justice Douglas, dissenting from the denial of certiorari, *Dun & Bradstreet, Inc. v. C. R. Grove*, 404 U.S. 898, 905 (1971). This case involved, *inter alia*, the constitutional protection afforded the *Dun & Bradstreet* business reports in the context of alleged libel.

In *S.E.C. v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971), the sequel to the famous securities fraud case, the court rejected defendants' argument that to hold them liable under § 10(b) of the Securities and Exchange Act of 1934 for mere negligence in the preparation of a corporate press release would infringe upon defendants' first amendment rights. The Court cited *Valentine* and other cases in support of the proposition that the first amendment does not deal with "commercial 'factual' speech." *Id.* at 1306. See also *U.S. v. Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

It would seem that a better approach would be to extend first amendment protection to such speech but justify § 10(b) liability on an expanded theory of commercial fraud or misrepresentation. The extremes to which the "commercial speech" exception may lead are illustrated

other speech.<sup>53</sup> Justice Douglas may be right, and a good case may be made that debate on any issue, whatever the impulse, source, or content should be treated equally and enjoy the most expanded freedom.<sup>54</sup> This reasoning, however, does not extend to commercial-content ads promoting the sale of a product or a service. While their informational context may entitle them to some first amendment protection, as trade tools, commercial-content ads should be treated as part and parcel of the business to which they pertain.

Thus, it comes as no surprise, that with respect to commercial-content ads, the *Valentine* approach is well entrenched and the Supreme Court recently reaffirmed its basic validity. In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*,<sup>55</sup> a local ordinance forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns was challenged as violative of the first amendment. In upholding the ordinance, the majority of the Court categorized such advertisements as classic examples of commercial speech and decided that the *Valentine* rule applied even though the regulation directly affected the editorial judgment of the newspaper as to where to place the advertisement.<sup>56</sup>

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by S.E.C. v. Wall Street Transcript Corp., 422 F.2d 1371, 1379-81 (2d Cir.), cert. denied, 398 U.S. 958 (1970), where a financial newspaper was accorded lesser first amendment status on this basis. Cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 (1st Cir. 1970), cert. denied, 400 U.S. 850 (1971); Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970), cert. denied 400 U.S. 850 (1971).

The distinction between speech disseminating commercial opinion or information on the one hand and commercial product or service advertising on the other was recognized in *Hodges v. Fite*, 332 F.Supp. 504 (D.Neb. 1971), but the court went on to find, without much justification, that dancing in a bar constitutes simply an advertisement for the sale of liquor and, therefore, does not come within the ambit of first amendment. The court cited *Valentine* and the court's holding could be understood in terms of commercialization-by-association.

<sup>53</sup> Mr. Justice Douglas recently went as far as completely disavowing *Valentine*. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400 (1973). (Douglas, J. dissenting).

<sup>54</sup> See, Redish *supra* note 46, at 441-44, 451-52, 472-73.

<sup>55</sup> 413 U.S. 376 (1973).

<sup>56</sup> *Id.* at 383-91. Of the four dissenting justices, only one, Mr. Justice Douglas, would reconsider the *Valentine* holding. *Id.* at 400-03. The other three, the Chief Justice and Mr. Justices Stewart and Blackmun, were mainly concerned with what they perceived to be the infringement of a newspaper's right to arrange the layout of its pages:

The [majority] acknowledges, as it must, that what it approves today is not a restriction on a purely commercial advertisement but on the editorial judgment of the newspaper, for "the newspaper does make a judgment whether or not to let the advertiser select the column."

*Id.* at 401, n.7 (Stewart, J., dissenting).

Chief Justice Burger, dissenting, saw a "disturbing enlargement of the 'commercial speech' doctrine," citing *Valentine*, and expressed the fear that it would also launch the courts on what I perceive to be a treacherous path of defining what layout and organization decisions of newspapers are "sufficiently associated" with the "commercial" parts

Perhaps the most famous and interesting recent cases in the area of advertising regulation are those dealing with the validity of the restrictions, and eventual ban, on cigarette advertising in the broadcast media. In *Banzhaf v. FCC*,<sup>57</sup> an FCC ruling requiring radio and television stations carrying cigarette advertisements to devote a significant amount of time to the case against cigarette smoking was upheld against a charge that the ruling violated the first amendment. In response to the argument that the FCC ruling would have a "chilling effect" on cigarette advertising, the Court stated that

The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some utterances fall outside the pale of First Amendment concern. Many cases indicate that product advertising is at least less rigorously protected than other forms of speech.<sup>58</sup> (citations omitted).

The Public Health Cigarette Smoking Act of 1969<sup>59</sup> went a step further and completely banned cigarette advertising in the broadcast media. In upholding the constitutionality of the ban, the District Court for the District of Columbia stressed again that "product advertising is less vigorously protected than other forms of speech"<sup>60</sup> and referred to the "rather limited extent to which product advertising is tangentially regarded as having some limited indicia of such [first amendment] protection."<sup>61</sup>

The pervasiveness of the view that commercial-content ads are not protected speech is reflected in the fact that no first amendment type argument was pressed in most of the federal and state cases dealing with the validity of state prohibition of price advertising by pharmacists, optometrists, dentists, barbers, morticians, and beauty shops.<sup>62</sup>

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of the papers as to be constitutionally unprotected and therefore subject to governmental regulation.

*Id.* at 393.

<sup>57</sup> 405 F.2d 1082 (D.C. Cir. 1968).

<sup>58</sup> *Id.* at 1101.

<sup>59</sup> 15 U.S.C. § 1335 (1970).

<sup>60</sup> *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 584 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

<sup>61</sup> *Id.* at 585. Judge Wright dissented on the theory that the prior FCC finding that cigarette advertisements constituted "controversial speech" for purposes of the fairness doctrine, which had been sanctioned in the *Banzhaf* case, *supra* note 35, took them out of the "product advertising" exception under the first amendment. *Id.* at 591-92, 594.

<sup>62</sup> For a collection and analytical discussion of the cases, see Note, *Constitutional Law—A Statute Which Prohibits the Advertising of Prescription Drug Prices Is Unconstitutional*, 37 BROOKLYN L. REV. 617 (1971). See also Lydick, *State Control of Liquor Advertising Under*

It is also significant that the debate concerning recent efforts to regulate intrusive advertising (the federal,<sup>63</sup> state, or local<sup>64</sup> highway billboard legislation, and the FCC attempt in 1963 to impose limitations on the length and frequency of broadcast commercials<sup>65</sup>) seldom, if ever, revolved around first amendment considerations.

The categorization of advertising not as an integral part of free speech but rather as a subject for regulation consistent with due process is sound,<sup>66</sup> and there is no prospect of any significant change in this area in the foreseeable future.

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the United States Constitution, 12 BAYLOR L. REV. 43-45 (1960). In these cases, the challengers chose mostly to rely on economic due process grounds (with very limited success) or on grounds of interference with interstate commerce (again losing most of the time). See Annot., *Statute or Ordinance Regulating or Prohibiting Advertising as Unconstitutional Burden on Interstate Commerce—Federal Cases*, 10 L. Ed.2d 1386-94 (1966). A recent Supreme Court case in this area, *Head v. Board of Examiners*, 374 U.S. 424 (1963) exemplifies this. In upholding the constitutionality of a New Mexico statute forbidding price advertising for eyeglasses, the Court had to deal only with contentions that the statute imposed a burden on interstate commerce and that the regulation of radio advertising had been preempted by the Federal Communications Act of 1934.

In a very recent and exceptional case, *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), where First Amendment recognition was given to the claim of petitioners that they were being deprived of useful information under a Virginia statute barring price advertising of prescription drugs, the court emphasized the non-trading interest of the consumers and the importance of their right to know. The commercial-content exemption figured also prominently in *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972). A case upholding the constitutionality of § 804(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(c) which prohibits discriminatory ads relating to the sale or rental of housing. For the validity of comparable state legislation, see *An Anti-Blockbusting Ordinance*, 7 HARV. J. LEGIS. 402 (1970).

<sup>63</sup> See *Hearings on S. 963*, *supra* note 27, *passim*; *Hearings on S. 2084 Before the Subcomm. on Public Roads of the Senate Comm. on Public Works*, 89th Cong., 1st Sess. (1965) *passim*; *Hearings on H.R. 8487 Before the Subcomm. on Roads of the House Comm. on Public Works*, 89th Cong., 1st Sess. (1965), *passim*; and *Hearings on S. 1467*, *supra* note 27.

<sup>64</sup> For a general description and references, see Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH.L. REV. 1296, 1327-29 (1973). Cunningham reports that although such state legislation has been held to be within the state police power, the courts universally reject free speech challenges. A noteworthy case in this area is *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 428-29, 439 P.2d 248, 262-63 (1968), *appeal dismissed*, 393 U.S. 316 (1969), where a make-weight first amendment challenge to the state Highway Advertising Control Act of 1961 was decisively rejected on the strength of *Valentine* and *Kovacs*. The Court made particular reference to the "intrusive quality of highway outdoor advertising" and to "its pure commercial nature" and stated the question to be "whether the public's right to enjoy the highways free of the dangerous, obtrusive, and unsolicited presence of advertising structures is outweighed by the minimal free speech interest claimed by the plaintiffs." 73 Wash. 2d 428-29, 139 P.2d at 262. See, also, *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952). Cf. *Fifth Avenue Coach Co. v. New York*, 221 U.S. 467 (1911).

<sup>65</sup> See notes 174-188, *infra*.

<sup>66</sup> According to Professor Emerson, a leading expounder of first amendment theory:

*B. Advertising Regulation to Minimize Intrusion Is Consistent with Due Process*

The progressive erosion of constitutional control through substantive due process, at least in the business context, is too well known to require extensive discussion or documentation. Regulation which has a rational relationship to a proper subject for legislative action will be upheld as a matter of course.<sup>67</sup> The main source of authority to regulate advertising at the federal level would be the commerce power<sup>68</sup> while the states would rely on their general police power to regulate commerce and the use of property for the general

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"Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression." T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 105 n. 46 (1966).

Despite the apparent relevance of the First Amendment to regulation of the content of commercial advertising, courts have generally dealt with prohibitions of truthful advertising in terms of due process standards only. . . . The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which the state and federal governments enjoy wide powers of regulation.

Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195-96 (1965). For an argument in support of some first amendment protection of "information" or "artistic" advertising, see Redish, *supra*, note 46 at 432-33, 446-47.

<sup>67</sup> See generally, E. BARRETT, JR. & P. BRUTON, *CONSTITUTIONAL LAW*, 713-35 (1973); W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 463-82 (1970). As stated in *Berman v. Parker*, 348 U.S. 26, 32 (1954):

Subject to constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

The last U.S. Supreme Court case where economic legislation was struck down as violative of due process is *Thompson v. Consolidated Gas Co.*, 300 U.S. 55 (1937), involving a determination that property was being taken for a private purpose. The Court is content to leave economic policy to the legislature to such an extent that it has been asserted that "no claim of substantive economic rights could now be sustained by the Supreme Court. The judiciary has abdicated the field." McCloskey, *Economic Due Process and the Supreme Court: An Examination and Rebuttal*, 1962 SUP. CT. REV. 34, 38. While the practice of the state courts is not as conclusive, there is no doubt that state legislatures enjoy the broadest discretion in regulating property. Cf. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW.U.L. REV. 13, 226 (1958).

<sup>68</sup> U.S. CONST. art. I, § 8[3]. See generally, W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 67 at 164-84.

The comprehensiveness of such power is not easily exaggerated. In particular, it includes the regulation or exclusion from interstate commerce of articles the use of which may be injurious to the public health, morals or welfare of the states for which such articles are destined. *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *United States v. Weatherford*, 471 F.2d 47, 51 (7th Cir. 1972). It is worth noting that in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), it was stated that in the regulation of interstate commerce, "Congress has the power to prohibit the advertising of cigarettes in any media." See also authorities cited in note 7, *supra*.



welfare.<sup>69</sup> More particularly, any constitutional challenge to advertising regulation would appear to be almost hopeless. As conceded by Redish, probably the most vocal advocate of *laissez-faire* in advertising:

[I]f the state had absolutely no justification for restricting the dissemination of commercial speech, it is possible that the [Supreme] Court would consider such action a violation of the First Amendment. Such minimal protection, however, is no different from the now virtually worthless property protection which advertising has received to this point. In any case, the situation where the state had no justification whatsoever would be rare indeed.<sup>70</sup>

Health considerations have been found to be more than sufficient to support the total ban of cigarette advertising in the broadcast media.<sup>71</sup> The public interest in safe travel and natural beauty provided ample justification for the prohibition of advertising on the interstate highways.<sup>72</sup>

It is also to be remembered that the regulation of advertising, even its complete elimination, does not constitute the "taking" of property giving rise to an obligation to provide compensation under eminent domain principles.<sup>73</sup> Of course, if the regulation of advertis-

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<sup>69</sup> See generally *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Lawton v. Steele*, 152 U.S. 133 (1894).

<sup>70</sup> Redish, *supra* note 46, at 431.

<sup>71</sup> See note 60 *supra*.

<sup>72</sup> The federal legislation of 1958 (72 Stat. 904), which declared it to be a national policy to regulate billboard advertising on interstate highways and which provided financial incentives to the states, specifically referred to the "convenience" and "enjoyment of public travel" in addition to safety. It was superseded in 1965 by the Federal Highway Beautification Act, (23 U.S.C. §§ 131, 136, 319) which also included among its aims the promotion of "the recreational value of public travel" and the preservation of "natural beauty." See also *Hearings on S. 963*, *supra* note 27, at 47-61, 84-86. The constitutionality of this legislation has not been seriously challenged. See note 99, *infra*, for state cases upholding the constitutionality of the implementing state statutes.

<sup>73</sup> On the distinction between "taking" and "regulation," see generally Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); and Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954). In the *Hearings on S. 963*, *supra* note 27, the question was repeatedly raised whether the proposed total ban of billboard advertising on interstate highways by the states under federal subsidies constituted the "taking of property," especially as the law would apply to preexisting signs. The prevailing opinion was, however, that this would amount to no more than regulation within the police power of the states and therefore would not give rise to a compensable obligation under eminent domain principles.

Implementing state and local legislation for the removal of highway advertising signs, including preexisting signs, has since been sustained against a "taking" challenge. See, e.g., *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973); *Markham Advertising Co. v. State*, *supra*, note 64 at 260-61; *New York State Thruway Authority v. Ashley Motor Court*, 10 N.Y. 2d 151, 157, 176 N.E.2d 566, 569, 218 N.Y.S.2d 640 (1961); *F.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1151 (5th Cir. 1970). See also Cunningham,

ing is really aimed at or has the effect of seriously affecting the circulation or editorial function of the media or jeopardizing the media's continued existence, then such regulation may run afoul of the first amendment.<sup>74</sup> But no such problem exists with the measured interference which will be proposed by the author. On the contrary, it would constitute no more than minimal business regulation to which the media are clearly subject.<sup>75</sup>

### C. *The Importance of Privacy*

Two questions remain on the substantive side. First whether intrusive advertising as such is a proper concern of government, and second, whether the advertising to be particularly regulated is indeed intrusive.

While health, safety, and morals are at the core of government action for the common good, the citizen's privacy, tranquility, and convenience are valid considerations for regulatory action.<sup>76</sup> Under traditional tort principles, the concept of private "nuisance" is used to prevent the use of one's property in such a way that such use interferes with the quiet use and enjoyment of other people's property;<sup>77</sup> and "public nuisance" extends this approach to interference with the public's use of public places.<sup>78</sup> In recent times, the right of

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*Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH. L. REV. 1296, 1346-56 (1973); Comment, *Outdoor Sign Regulation in Eden and Wisconsin*, 1972 WIS. L. REV. 153.

<sup>74</sup> See, e.g., *Grosjean v. American Press*, 297 U.S. 233 (1936). See also *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra* note 53.

<sup>75</sup> For particular instances of valid business regulation of the mass media, see, e.g., *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 179 (1946); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937). See also DuVal, *Free Communication of Ideas and the Quest for Truth; Toward a Teleological Approach to the First Amendment*, 41 GEO. WASH. L. REV. 161, 233 (1972); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 162 (1967).

<sup>76</sup> "The police power of a state . . . comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community" [citing *Chicago B.&O.R. Co. v. Illinois*, 200 U.S. 561, 592 (1906), *Nebbia v. New York*, 291 U.S. 502, 525 (1934), and *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82 (1946)]. *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). On the "interest of the public in the quality of life and the total community environment, [and] the tone of commerce in the great city centers," see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

<sup>77</sup> See generally W. PROSSER, *LAW OF TORTS* 591-96 (1971). While traditionally private nuisance involved interference only with the use and enjoyment of land, the basic rationale covers all sorts of unwarranted intrusions. As aptly stated, "The law of nuisance, while technically relating to property rights, involves a 'recognition of the value of human sensations.'" *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890).

<sup>78</sup> See generally, W. PROSSER, *LAW OF TORTS* 583-91 (1971). On the treatment of un-

privacy in the broadest sense has emerged as a fundamental right of the citizen under the Constitution.<sup>79</sup> It may be that the most burning controversies involve freedom of private conduct (use of contraceptives,<sup>80</sup> abortion,<sup>81</sup> obscenity,<sup>82</sup> etc.), freedom from surveillance,<sup>83</sup> and freedom from publicity,<sup>84</sup> but privacy in the sense of freedom from unwanted interference is quite important as well.<sup>85</sup> Indeed, all of these

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slightly displays or billboard advertisements or signs as public nuisances, see 3 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, §§ 986-88 (1943). See also, *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 730 (1963) and *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969). Cf. HIGHWAY RESEARCH BOARD, *OUTDOOR ADVERTISING ALONG HIGHWAYS: A LEGAL ANALYSIS* 27 (1958). On the banning of door-to-door commercial solicitation as a public nuisance, see, e.g., *Village of West Jefferson v. Robinson*, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Note, *Assault Upon Solitude—A Remedy?*, 11 SANTA CLARA LAW, 108, 116-19, 122-24 (1970). The constitutionality of this approach has been upheld in *Breard v. Alexandria*, 341 U.S. 622 (1951).

Non-obscene but offensive explicit sexual materials have also been banned as "noxious public nuisances" on a theory of visual pollution. *Rabe v. Washington*, 405 U.S. 313, 317 (1972) (Burger, C.J., concurring); and *Cactus Corp. v. State*, 14 Ariz. App. 38, 480 P.2d 375 (1971). Cf. Feldman, *Class Actions Against Noise*, TRIAL, Sept./Oct. 1972, at 53.

<sup>79</sup> It is not an exaggeration to state that the constitutional right of privacy, first articulated in a seminal article by Samuel Warren and Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193-220 (1890), has had an explosive growth of recognition during the last few years. For a detailed discussion of these developments and a great deal of background material, see A. MILLER, *THE ASSAULT ON PRIVACY* (1971); and A. WESTIN, *PRIVACY AND FREEDOM* (1970). On November 7, 1972, the California voters approved a constitutional amendment to elevate "privacy" to the status of an inalienable right. See CALIF. CONST. art 1, § 1. Hawaii also amended its constitution elevating the right to be free from invasions of privacy to constitutional stature. See *State v. Kantner*, 53 Haw. 327, 340 493 P.2d 306, 314 (1972) (dissenting opinion).

The constitutional right of privacy should not be confused with the state's interest in protecting the privacy of its citizens, which antedates the former by many years. For a classification of the traditional tort categories of privacy, see Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). It goes without saying, however, that the acceptance of privacy as a constitutional right strengthens the case for its protection at the legislative level. See Note, *Constitutional Law—Freedom to Communicate Versus Right to Privacy: Regulation of Offensive Speech Limited by "Captive Audience" Doctrine*, 48 WASH. L. REV. 667, 678 (1973).

<sup>80</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>81</sup> *Roe v. Wade*, 410 U.S. 133 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>82</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>83</sup> *Alderman v. United States*, 394 U.S. 165 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). See also, *Hambeger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964); *Nader v. General Motors*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

<sup>84</sup> *Time Inc. v. Hill*, 385 U.S. 374 (1967); *Dietemann v. Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968).

<sup>85</sup> On the "solicitude for the privacy of the unwilling recipient" as the "basic justification for regulating or prohibiting the use of a particular means of communication," see Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1200-01 (1965). "[T]he growing recognition that the right to privacy includes a right to be free from unwanted intrusions gives impetus to claims of a right not to be spoken to." Haiman, *Speech v. Privacy*:

concepts of privacy spring from the same basic value system and preserve the freedom of choice and the tranquility of the individual against encroachment by outsiders.<sup>86</sup> While such interference by groups or persons not acting under government authority may not be unconstitutional and judicially enjoinable as such, such interference certainly is subject to legislative control or prohibition.

The degree to which privacy in the sense of freedom from intrusion is recognized is reflected in the fact that the Supreme Court has given weight to privacy and balanced it against admittedly protected speech.<sup>87</sup> The Supreme Court has left no doubt that a speaker has no right to force his message upon an unwilling listener, and has repeatedly upheld the power of government to regulate speech in public places in the interest of the use and enjoyment of such places free from intrusion. This, of course, applies a fortiori to commercial messages which enjoy minimal first amendment protection.

Three Supreme Court cases in this area warrant special attention. The first is *Kovacs v. Cooper*,<sup>88</sup> involving a municipal ordinance banning the use of sound trucks, loud speakers, and the like on public streets. In upholding the constitutional validity of the ordinance, the Court used language which is pertinent:

The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy. . . . The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and

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*Is There a Right Not to Be Spoken to?* 67 NW. U.L. REV. 153, 157 (1972). See also Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 37-40 (1967); Note, *Assault Upon Solitude—A Remedy?* 11 SANTA CLARA LAW. 109 (1970).

<sup>86</sup> Cf. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 963-73 (1964).

<sup>87</sup> According to Professor Emerson:

Exercise of the right to express oneself may also come into conflict with those interests of other individuals which may be grouped under the general heading of a right to privacy—this is the right of a person to be free at some point from intrusion

. . . .

The applicable doctrine [with respect to communication which by its nature disturbs the quiet or repose of an individual or a neighborhood] should be one of fair accommodation of the two interests—communication and privacy. The restriction can be couched in terms of a limitation on time, geographical area or decibels or the allocation of space in the public park system.

T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 74-76 (1966). See also Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1021-22 (1971).

<sup>88</sup> 336 U.S. 77 (1949).

tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people . . . In his home or on the street, [the unwilling listener] is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality. . . . The preferred position of freedom of speech . . . does not require legislators to be insensitive to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.<sup>89</sup>

In his concurrence, Mr. Justice Frankfurter used even harsher words against intrusive speech:

So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.<sup>90</sup>

The second case is *Rowan v. United States Post Office Department*.<sup>91</sup> In *Rowan*, at issue was the constitutionality of a federal statute under which a householder is empowered, in certain circumstances, to require that a mailer remove his name from its mailing lists and stop all future mailings to the householder. Under the statute, a householder who receives advertisements that offer for sale matter which he personally believes to be sexually provocative may trigger a procedure through the Post Office for his complete insulation from any and all future mailings from the same sender. In rejecting the first and fifth amendment claims of the challengers, the Supreme Court stressed the importance of the right of every person "to be let alone" and stated:

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information and arguments which, ideally, he should receive and consider . . . Weighing the highly important right to communicate but without trying to determine where it fits into constitutional imperatives against the very basic

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<sup>89</sup> *Id.* at 81, 83, 87, 88.

<sup>90</sup> *Id.* at 97.

<sup>91</sup> 397 U.S. 728 (1970).

right to be free from sights, sound and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee . . . . To hold less would tend to license a form of trespass . . . . Nothing in the constitution compels us to listen to or view any unwanted communication, whatever its merit . . . . In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence . . . . We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.”<sup>92</sup>

In no other case has the Court used such strong language in support of “the very basic right to be free from sights, sounds, and tangible matter we do not want.” This right is of course at its maximum when one is invaded in his own home as in *Rowan*. It exists also when one is unwillingly disturbed in other places where he has the right to be. This was the position earlier taken by the Court in the third case, *Public Utilities Commission v. Pollak*.<sup>93</sup> In *Pollak*, the Court of Appeals for the District of Columbia Circuit had upheld plaintiff's claim that he had been deprived of his constitutional liberty without due process of law when he was unwillingly exposed to music and commercial announcements as a passenger in the streetcars of Capital Transit Company, a public utility under congressional franchise. The court of appeals cited *Kovacs* in support of the public interest in freedom from forced listening and emphasized that the *Kovacs* rationale was even more applicable when the speech involved was commercial communication not protected by the first amendment. The court of appeals found no reasonable relation between a proper governmental purpose and forcing passengers to listen to the streetcar broadcasts. In reversing, the majority of the Supreme Court made a distinction between privacy enjoyed in a person's home and in a public thoroughfare or in a public conveyance. In the latter instance, the privacy is limited by the interests of all others concerned.<sup>94</sup> The Court concluded that there was no violation of the plaintiff's right of privacy of such dimension as to amount to an infringement of constitutional liberty by public authority. Mr. Justice Douglas entered a dissent which has become famous:

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<sup>92</sup> *Id.* at 736-37. In *Pent-R-Books, Inc. v. U. S. Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971), an even more burdensome procedure imposed on direct mailers under the Postal Reorganization Act of 1970, 39 U.S.C., §§3010-11, was upheld by a three-judge district court against a first amendment attack. The court stressed that a mailer's right to communicate ideas does not supersede the right of the addressee to be left alone.

<sup>93</sup> 343 U.S. 451 (1952).

<sup>94</sup> On this distinction, see also *Cohen v. California*, 403 U.S. 15, 21 (1971).

The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim of privacy is in the prohibition of the Fourth Amendment . . . . But even in his activities outside the home [man] has immunities from controls bearing on privacy . . . .

The present case involves a force of coercion to make people listen . . . .

The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. One who is in a public vehicle may of course not complain of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.<sup>95</sup>

One of the most promising developments in the definition of the public interest is the steadily spreading recognition of aesthetic considerations in the regulation of property use.<sup>96</sup> The legislative history

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<sup>95</sup> 343 U.S. at 467-68. And in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), involving the validity of the municipal practice of excluding political ads, while accepting commercial ads, in the public transit system, Justice Douglas (concurring) stressed again that "[T]he right of commuters to be free from forced intrusions on their privacy precludes the city from transforming the vehicles of public transportation into forums for the dissemination of ideas upon their captive audience." *Id.* at 307.

In some obscenity cases one can also detect a recognition of the right of a person in public places to be shielded from unwanted, offensive communication. In *Redrup v. New York*, 386 U.S. 767 (1967), the conviction of the defendants was reversed because the magazines in question were not obscene under the *Roth-Memoir* test and because in none of the convictions was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it . . . . And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*. *Id.* at 769.

The differentiation between willing and unwilling audiences in deciding whether sexually explicit material may be prohibited was taken up, for example, in *State v. Rabe*, 79 Wash. 2d 254, 484 P.2d 917 (1971), *rev'd on other grounds*, 405 U.S. 313 (1972). In that case, a film of doubtful obscenity was found to be subject to the prohibition of the state obscenity statute because of the manner and place of its presentation. What was crucial was that the exhibition of the film in an open-air theater from which it could be viewed by noncustomers constituted "an assault upon individual privacy" of nearby motorists and residents. On this point, *see also* T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 496 (1970).

The latest Supreme Court cases on obscenity, however, especially *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 *reh. denied*, 414 U.S. 881 (1973), would tend to reduce the importance of the *Redrup* approach by stressing that the private showing of sexually explicit material does not shield it from suppression.

<sup>96</sup> Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347, 1373-96 (1971); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L.

and subsequent litigation relating to the recent federal anti-billboard legislation exemplifies this. One of the major arguments against such legislation was that it was principally, if not exclusively, motivated by aesthetic considerations which were insufficient to support land use regulation.<sup>97</sup> Congress eventually adopted such legislation over these objections and its constitutionality has not been seriously challenged.<sup>98</sup> The few attacks in the courts against state implementing legislation on that ground failed without exception.<sup>99</sup>

If the government may take into account aesthetics, a fortiori, it has the power to combat intrusion. Unwanted intrusion goes beyond mere aesthetics and directly relates to comfort, convenience, and peace of mind. Aesthetics are also notoriously subjective while intrusion is easily definable and ascertainable. Few persons, if any, would object to the elimination of intrusion.<sup>100</sup>

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REV. 1075 (1970); Note, *Aesthetic Zoning: An Answer to Billboard Blight*, 19 SYR.L. REV. 87 (1967); and Note, *Zoning, Aesthetics and the First Amendment*, 64 COLUM. L. REV. 81 (1964)

<sup>97</sup> See, e.g., *Hearings on S. 963*, *supra* note 27, at 121, 215, 229, 233, 262-64, 321.

<sup>98</sup> For the case in favor of the propriety of aesthetic considerations in this context, see *id.* at 331-38.

<sup>99</sup> E.g., the Highway Advertising Control Act of 1961, WASH. REV. CODE ANN. § 47.42 (1970) referred to the public "welfare," "convenience," "enjoyment of public travel" and to the need to conserve "natural beauty."

In *Markham Advertising Co. v. State*, *supra* note 64, the Supreme Court of Washington upheld the validity of this legislation against the claim, that it involved an unconstitutional exercise of the police power "for the reason that it does not bear a reasonable and substantial relation to a proper legislative purpose." *Id.* at 258. Plaintiffs had charged that the principal, if not exclusive, purpose of the Act was to promote aesthetic values. The court rejected plaintiffs' narrow view of the public welfare and emphasized the broad scope of the police power, citing *Berman v. Parker*, 348 U.S. 26, 32 (1954). A few other examples of cases upholding state billboard regulation will suffice: *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 193 N.E. 799, 816 (1935); rules and regulations controlling outdoor advertising intended, among other things, to protect travellers "from the intrusion of unwelcome advertising" are within the state's police power. Opinion of the Justices, 103 N.H. 268, 270, 271, 169 A.2d 762, 764 (1961): "[T]he maintenance of natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised."

*Ghaster Properties Inc. v. Preston*, 176 Ohio St. 425, 438, 200 N.E.2d 328, 337 (1964):

In considering whether a proposed statute prohibiting billboards adjacent to a highway bears a real and substantial relation to the public welfare, the General Assembly may properly give weight not only to its effect in promoting public safety but also to its effect in promoting the comfort, convenience and peace of mind of those who use the highway, by removing annoying intrusions upon that use.

See also *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961).

<sup>100</sup> See notes 23-24 *supra*.

In a recent private discussion, it was suggested that before we regulate or ban intrusive commercials we should establish that they cause objective harm, e.g., are injurious to health—causing headaches, psychological problems, etc. In the context in which the suggestion was made, it was apparent that the suggestion expressed a positivistic approach, borrowed from the natural sciences, that only what can be "proven" scientifically is a proper basis for action.



### D. *The Intensiveness of Advertising and the Question of Captive Audiences*

Probably the most important question about broadcast and print media advertising is whether it is indeed unreasonably "intrusive," in the sense that it forces itself upon unwilling individuals. For example, it has been suggested that in the broadcast media the viewer or listener always has the option of "tuning out" by changing channels or turning the set off;<sup>101</sup> or, for that matter, it may be said that he always can decide not to watch or hear the commercials. As for the print media, it is indisputable that the reader has an even greater margin of flexibility in avoiding the advertisements. In other words, granted that commercial-content speech is not constitutionally protected, are there sound policy reasons for intervention in the garden variety of the nondeceptive advertisement ubiquitous in our mass media? If such commercial communication involves voluntary action between the consenting parties, why should the state or anyone else interfere?

The truth is, however, that the element of voluntariness is but a grand illusion and most people who are not prepared to abandon the mass media and become mental expatriates from society fall within the definition of captive audiences. The contention that a user of the media is given a real choice on whether to see the commercials is not serious. The advertisers have insured that commercials are generally so intertwined with other matter that a realistic escape, especially from ads in the broadcast media, would require the talent of Houdini coupled with the patience of Job.<sup>102</sup> Switching to other channels does not offer a meaningful choice when all the main sources of informa-

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Such an approach displays an exaggerated respect for the perfection of the scientific method and ignores the fact that, in final analysis, our legal system so often reflects value judgments. In making policy, it is important that we continue to be guided by the values shared and judgments made by our citizenry and articulated through the democratic process rather than limit our choices to what can be designated as good or bad by the technocracy. For example, if many or most people find noise annoying and disturbing, then there is a basis for its curbing or limitation without necessarily establishing that such noise damages the ears, that it induces headaches, or that it may cause brain tumors. And the same rationale applies to intrusive advertisements.

It is to be noted that in the most recent Supreme Court decision on obscenity, the Court emphasized that the state may legislate against what is commonly perceived to be harmful without necessarily having to adduce related scientific proof. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, *reh. denied*, 414 U.S. 881 (1973).

<sup>101</sup> See note 187, *infra*. Cf., *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting); and *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

<sup>102</sup> That the individual pays a psychological price in his attempt to shut out unwanted and intrusive stimuli is also well known. See testimony by Professor Brazelton of Harvard University, 1971 *Hearings on Advertising Before the Federal Trade Commission* at 1261-65.

tion are infested with commercials. The plaintiff in *Rowan*, the direct mail target, certainly had an easier method of avoidance than the average viewer or reader since the road between the mailbox and the wastebasket was short. Nevertheless, the Supreme Court upheld the stringent limitation which the statute imposed upon the sender.<sup>103</sup> If the mere possibility of avoidance were enough to defeat a claim of intrusion, then the plaintiff in *Kovacs* could have shut out the noise of the sound trucks simply by wearing ear plugs.<sup>104</sup>

In terms of intrusiveness, mass media advertising is as unavoidable as billboard advertising, and the same suppression or limitation rationale applies. A perceptive observer noted the similarity in the captive position of the various audiences exposed to advertising in the following terms:

Justice Brandeis . . . asserted that "The radio can be turned off but not so the billboard or streetcar placard." In a literal sense there may be some truth to this assertion. But, realistically, the distinction

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<sup>103</sup> In *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), the Court indicated that to permit the sending of unwanted mail is akin to licensing "a form of trespass" and would "make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication." *Id.* at 737. Haiman justly argues that this is a dubious analogy: "Throwing an offensive piece of mail in the waste basket would appear to be a more accurate analogue to turning off a radio or television dial." Haiman, *supra* note 85, at 180. Similarly, "[i]t would seem that a person is no more 'captive' with regard to mailed matter than he is in relation to the other media which may enter his home." Note, *Pandering, First Amendment Rights and the Right to Privacy*, 22 BAYLOR L. REV. 442, 451 (1970).

See also, Comment, *Constitutional Law—First Amendment—Householder's Right to Restrict Commercial Obscenity Sent Through The Mails*, 3 RUTGERS-CAMDEN L.J. 144, 150 (1971). It is quite interesting to note that the public generally objects less to junk mail than to television ad intrusion. According to a Postal Service study conducted in 1973, only twenty-eight percent of the populace says that it does not want unsolicited advertising mail. *Mail Advertisers Hate The Term 'J—k Mail' And Fight To Junk It*. Wall Street Journal, Oct. 2, 1973, at 1, col. 4. Viewer dissatisfaction with TV commercial practices is much higher. See note 24, *supra*.

<sup>104</sup> While "sound waves pursue their hearers more doggedly than light waves their viewers" and "an audience experiences more captivity when confronted by aural as opposed to visual communication," the difference is one of degree. Haiman, *supra* note 85, at 182-83.

On the oppressive intrusion of visual signs, see *General Outdoor Advertising Co. v. Dept. of Public Works*, 289 Mass. 149, 168, 193 N.E. 799, 808 (1935), *appeal dismissed*, 297 U.S. 725 (1936), to the effect that:

[Outdoor advertising] is forcibly thrust upon the attention of all such persons [who travel on the highways], whether willing or averse. For such persons who strongly wish to avoid advertising intrusion, there is no escape; they cannot enjoy their natural and ordinary rights to proceed unmolested.

*Cf.* *State v. Rabe*, 79 Wash. 2d 254, 267, 484 P.2d 917, 924, (1971), *rev'd on other grounds*, 405 U.S. 313 (1972):

To argue that the adjoining homeowners and motorists in the vicinity of the outdoor theater could have preserved their freedom to view what they pleased by drawing their curtains or averting their eyes is specious.

represents a great simplification. People constantly "turn off" billboards and advertisements, not to mention the sounds of surrounding voices, often without blinking an eye or twitching an ear. Even in the realm of physical movement, one can avert his eyes as quickly from an offensive display sign as he can turn off an unwelcome radio or TV message . . . . Justice Brandeis also tried to distinguish between billboards, on the one hand, and newspapers and magazines on the other, on the grounds that the billboard is thrust upon us "by all the arts and devices that skill can produce" whereas "there must be some seeking by one who is to see and read the advertisement" in a newspaper or magazine . . . . Given the assumption that one browses through a newspaper or a magazine, he is just as subject to an unexpected full-page ad being thrust upon him when out driving on the highways—which he also makes a choice to do or not to do. Can one argue that there is less free choice involved in using a particular highway than in picking up a given newspaper?<sup>105</sup>

In a recent important case relating to advertising, *Columbia Broadcasting System, Inc., v. Democratic National Committee*,<sup>106</sup> the Supreme Court finally linked the *Kovacs* and *Pollak* rationales with the broadcast media. In recognizing the plight of the viewer, it stated in no uncertain terms that

The [Federal Communications] Commission is also entitled to take into account *the reality that in a very real sense listeners and viewers constitute a "captive audience."* The "captive" nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion on his set." As the broadcast media became more pervasive in our society, the problem has become more acute . . . .<sup>107</sup>

Mr. Justice Brennan in his dissent made reference to the "broadcasters continuing to invade the 'privacy' of the home through commercial advertising."<sup>108</sup>

Granting that print media "commercials" are less intrusive in

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<sup>105</sup> Haiman, note 85 *supra*, at 177-78. Haiman also refers to the similarity between billboards and "spot announcement[s] sandwiched between two scenes of our favorite TV spellbinder," and concludes that "[i]n short, if it is a problem of freedom of choice, it is a problem that cuts across a much wider range of communication situations." *Id.* at 179.

<sup>106</sup> 412 U.S. 94. (1973).

<sup>107</sup> *Id.* at 127-28 (citations omitted; emphasis added).

<sup>108</sup> *Id.* at 194, n. 35. Former Senator and Attorney General Saxbe recently warned against an "overdose of television commercials which annoy the public in the privacy of their own homes." Wall Street Journal, *supra* note 13, at col. 3.

that the reader has greater control over selection and timing of what he reads, such advertisements are still visually inescapable. The *Rowan* case recognized the privacy violation involved in being burdened with reading matter that one does not want. In reality, the alternative to being exposed to commercials which is available to the public is not to watch or listen or read at all. Compulsion which comes from circumstances is as real as compulsion which comes from a command.<sup>109</sup>

### E. *The Public Interest in the Mass Media*

In this context, regulation of the media, without interference with first amendment freedom, is proper. More than many other industries, the mass media operate in a field involving vital public interests,<sup>110</sup> and therefore have responsibilities beyond those of routine commercial enterprises. As a matter of fact, one of the principal justifications for the preferential treatment and exalted status accorded to the mass media by the first amendment is precisely the media's central role in the exchange of information and ideas presumably leading to better self-government and greater truth in society. The oft-quoted language of Mr. Justice Frankfurter, concurring in *Associated Press v. United States* eloquently expresses this notion:

[I]n addition to being a commercial enterprise [the Associated Press] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes . . . I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different facets and colors as is possible".<sup>111</sup>

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<sup>109</sup> *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

<sup>110</sup> The best articulation of the point that the public interest justifies greater control over the use of property was made in the landmark case of *Munn v. Illinois*, 94 U.S. 113, 126 (1876): Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

<sup>111</sup> 326 U.S. 1, 27-28 (1945).

What was said of the broadcast media in *Business Executives' Move for Vietnam Peace v. F.C.C.*<sup>112</sup> applies to all media as well:

[The broadcast media] function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the process of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.<sup>113</sup>

This public interest component of the first amendment, as contrasted with the interest of the speaker, has been clearly in the ascendancy<sup>114</sup> and the increasing dependency of the public on the mass media rather than on private or small scale communication calls for an even greater expansion.<sup>115</sup> The argument for a right of access to the media stresses as much the importance of exposing the public to diverse views as the need of protecting the expression of the speaker.<sup>116</sup>

<sup>112</sup> 450 F.2d 642 (D.D.C. 1971), *rev'd on other grounds sub nom.*, *Columbia Broadcasting System v. Democratic Nat'l Comm.* 412 U.S. 94 (1973).

<sup>113</sup> *Id.* at 653-54. See also *Herald Co. v. Seawell*, 472 F.2d 1081, 1095 (10th Cir. 1972). For a summary of the basic values underlying the protection of free speech, see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970).

The late Professor Meiklejohn was the most influential exponent of the self-government rationale. See, e.g., A. MEIKLEJOHN, *POLITICAL FREEDOM* 18-19, 26-28 (1948); and Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255. The Supreme Court has been quite receptive to this concept. For Justice Brandeis's position on this, see *Whitney v. California*, 274 U.S. 357, 375-76 (1927). For recent reaffirmations, see *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times v. United States*, 403 U.S. 713, 717 (1971); and *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 381-82 (1973). See also, Ervin, *Introduction*, 60 GEO. L.J. 871 (1972).

The "search-for-truth" and "market place of ideas" rationales, forcefully articulated by John Stuart Mill, especially in his work *On Liberty*, probably had greater impact than any other single factor in the Supreme Court's interpretation of the first amendment. Particularly famous is the eloquent exposition of this philosophy by Mr. Justice Holmes (dissenting) in *Abrams v. United States*, 250 U.S. 616, 630-31 (1919). See generally, Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 32-33, 136-38 (1941).

<sup>114</sup> Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970). See also *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967), to the effect that the guarantees of the free speech and press "are not for the benefit of the press so much as for the benefit of us all." In *Bursey v. United States*, 466 F.2d 1059, 1083-84 (9th Cir. 1972) it was stated that:

[F]reedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information.

<sup>115</sup> Cf. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 151 (1967).

<sup>116</sup> J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973); Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); and Comment, *The Broadcast Media and the First Amendment: A Redefinition*, 22 AM. UNIV. L. REV. 180 (1972). The access argument, at least in so far as it is based on the first amendment, was dealt a severe blow,

Of particular relevance here is also the recognition under the first amendment of the right of the recipient of information (viewer, listener, reader) as contrasted with the right of the speaker. The most remarkable reference to this right occurred in the famous case of *Red Lion Broadcasting Co., Inc. v. F.C.C.*,<sup>117</sup> where the Supreme Court, per Mr. Justice White, stated that

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social, political esthetic, moral, and other ideas and experiences which is crucial here.<sup>118</sup>

To be sure, *Red Lion* concerned the broadcast media, which are regulated by the government principally because of the scarcity of the radio frequencies<sup>119</sup> and which are required specifically by statute to be operated in the "public interest, convenience and necessity."<sup>120</sup> The right of the recipient of information and ideas, however, is an integral part of the public interest in communications discussed above and underlies a number of important Supreme Court decisions in other areas as well. Furthermore, the scarcity rationale behind the special treatment of the broadcast media is losing its potency<sup>121</sup> and the courts are moving in the direction of treating all media alike.<sup>122</sup>

#### F. *The Inadequacy of Self-Correction and Self-Regulation*

In the context of this perception of the public function of the media, the contention that the government should adopt a "hands off" attitude toward intrusive advertising practices and that the public which does not love such practices ought to leave the media is unsound to the point of absurdity. Recognizing that the objecting

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however, in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

<sup>117</sup> 395 U.S. 367 (1969).

<sup>118</sup> *Id.* at 390.

<sup>119</sup> For a recent Supreme Court discussion of this point, see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-102 (1973). See also, Robinson, *supra* note 115 at 151.

<sup>120</sup> Sections 303 and 307 of the Communications Act of 1934, 48 Stat. 1082-83 as amended. See also, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

<sup>121</sup> Douglas, J. in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, note 119 *supra*, at 158-166; *Banzhaf v. FCC*, 405 F.2d 1082, 1099, 1100 (D.C. Cir. 1968), Robinson, *supra* note 115, at 157-59; and Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967).

<sup>122</sup> Robinson, *supra* note 115, at 162; Thomas, *The Listener's Right To Hear in Broadcasting*, 22 STAN. L. REV. 863, 885-886 (1970). It is noteworthy that legislation has been introduced in the Congress to extend the "fairness doctrine" and a right of access for editorial advertisements to the press as well. See Canby, *Access to Radio and Television*, 19 U.C.L.A. L. REV. 723, 744, n. 123 (1972).

public should not be required to closet itself in isolation, the "tune-out" argument may have some viability only if some other correction e.g., competition or self-regulation, can reasonably be expected to bring about adequate non-intrusive alternatives or to keep intrusion to a minimum. Experience shows, however, in view of the economics of the situation and the lack of organized opposition, that the intrusive commercialization of the media is universal and that public television and some specialized magazines may have been too meager to provide relief. As for self-regulation, it has proven a failure, especially in this area. There are no non-intrusion standards of any kind in the print media against overcommercialization, and the limitations in the Code of the National Association of Broadcasters, which in any event is voluntary and frequently ignored, are excruciatingly mild.<sup>123</sup> The National Advertising Review Board, recently set up by the industry to police abuses, appears aimed exclusively at deception, not intrusion.<sup>124</sup> It may be that some concern has been expressed in the industry over excessive advertising in terms of its reduced effectiveness, but the antidote is likely to be more skillful intrusion rather than less advertising.<sup>125</sup> It is accepted gospel in advertising that

getting attention means interrupting the consumer's on-going mental activity and replacing it with a new mental activity . . . . If it is to help the consumer to plan, an ad must interrupt on-going patterns of mental activity. Consumers tend to ignore—not perceive—advertisements. Only if the ad attracts attention will it serve the function of helping plan purchases.<sup>126</sup>

<sup>123</sup> The few enlightened broadcasters who are really serious about overcommercialization, e.g., Mr. McGannon, President of Westinghouse Broadcasting, are considered as "mavericks" in the industry and their protests to the FCC remain unheeded. Wall Street Journal, *supra*, note 15, at col. 2. The trend appears generally to be in the direction of more leniency, adjusting the Code to reflect rather than control industry practices. Industry leaders recognize that government intervention would be inevitable unless the advertising industry takes important new steps toward self-regulation. See, e.g., N.Y. Times, Nov. 10, 1970, at 78, cols. 4-6.

It is remarkable that there are no references or recommendations on advertising intrusion in a report submitted to the Secretary of Commerce by the Advertising Advisory Committee. U.S. DEPARTMENT OF COMMERCE, SELF-REGULATION IN ADVERTISING (1964).

<sup>124</sup> Wall Street Journal, May 25, 1971, at 11, cols. 1-4. For the full text of the "Statement of Organization and Procedures of the National Advertising Review Board," see *Hearings on S. 1461 and on S. 1753, supra* note 2, at 78-80.

<sup>125</sup> See, e.g., the clever full-page ads by Foote, Cone & Belding, Wall Street Journal, Jan. 17, 1973, at 15, and Wall Street Journal, Jan. 10, 1973, at 11.

See also a Reader's Digest full-page ad, N.Y. Times, Sept. 21, 1971, at 68; Wall Street Journal, Nov. 4, 1970, at 40, cols. 4-5; and Columbus (Ohio) Dispatch, April 12, 1970, at 59A, cols. 1-4. Cf., *Effects of Distraction and Commitment on the Persuasiveness of TV Advertising*, J. MKTG. RES., Feb., 1972, at 1-5.

<sup>126</sup> HOWARD AND HULBERT, ADVERTISING AND THE PUBLIC INTEREST—A STAFF REPORT TO THE FEDERAL TRADE COMMISSION V-1 and VIII-8 (mimeographed 1973). See also

It is also to be noted that the great promise in selectivity and versatility of cable communications does not appear sufficiently insulated against excessive commercialism to warrant optimism. While "Pay-TV" and comparable versions touted freedom and a choice for a price, it is now increasingly probable that cable communications will develop mostly along commercial lines with at least the same license as in broadcast communications for intrusive advertising.<sup>127</sup>

### III. MEASURED REGULATION TO FEND OFF INTRUSION—THE RULE OF SEPARATION

#### A. *The Fundamentals of Separation*

It is the thesis of this article that the excess of advertising intrusion may be corrected simply and without interfering directly either with the quantity or the quality of advertising or with the exposure of willing recipients to advertising to their hearts' content. This result could be accomplished by adopting what may be called the rule of separation, *i.e.*, the segregation of advertising from all other matter in a way that the viewer, listener, or reader will not receive forced exposure to the ads as a condition to getting to the media content. This would work as follows:

#### B. *Broadcast Media*

In the broadcast media, no commercial *interruption* of a program should be allowed. Advertising may be placed without time limitation either at the beginning and end of a particular program but not in between. In order that this rule does not affect adversely the length of programs, advertising should also not be allowed more often than once every one or two hours.

The self-regulation standards of the broadcasting industry contain only limitations on the number and duration of commercials, but

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ALLPORT, *supra* note 1, at 1-12. The language used in the advertising literature is quite revealing on this point. To take but a few examples: "We think of advertising as a hammer that drives home the nail of consumer loyalty." Gerhold, *How Advertising Works*, in HANDBOOK OF ADVERTISING MANAGEMENT, *supra* note 1, at 8-28. "With the bath of advertising in which the consumer typically lives . . ." *Id.* at 8-10. According to R. BAUER & S. GREYSER, *supra* note 5, at 239: "It is precisely this intrusiveness that is one of the attractions of radio and TV for the advertiser."

<sup>127</sup> The Cabinet Committee on Cable Television, in its long-awaited report to the President, has recently recommended that Cable TV be allowed to develop along private commercial lines, with minimum government regulation. *Cable Television Study Recommends Dividing Operators, Programmers With Little U.S. Control*, Wall Street Journal, Jan. 17, 1974, at 2, cols. 2-3. On the potential promise of cable communications generally, *see*, Wall Street Journal, Aug. 6, 1973, at 13, cols. 4-6.



frequent interruptions within programs and within the hour are permitted and common,<sup>128</sup> and the trend has been in the direction of more rather than fewer interruptions and commercials.<sup>129</sup> Furthermore, self-regulation is voluntary and many stations simply ignore the limitations.<sup>130</sup>

Broadcasters will probably find the separation proposal abhorrent since the intrusiveness of the commercials is relied upon to catch and hold the attention of the audience.<sup>131</sup> Hence, a ban on interruptions and the clustering requirement may reduce the number of minds per second that the broadcasters promise to deliver to the sponsors. Nevertheless, this need not have a major adverse impact on broadcaster revenues for at least two reasons.

First, if the regulation is industry-wide, no broadcaster will suffer a loss of competitive position because the sponsors could not go elsewhere for better terms—especially if the proposed regulation is extended to the print media. Since the sponsors have a substantial interest in media advertising, and since stations generally operate in a sellers' rather than buyers' market, and since the total volume of advertising and broadcaster revenues are on a continuous upswing,<sup>133</sup> the incidence of sponsor withdrawal and reduction of expenditures will probably be small and will not have serious consequences. The experience with the cigarette ad ban on the broadcast media is quite instructive. Even though such ads provided a substantial portion of their total revenue, the broadcasters were able to absorb the abrupt and absolute loss very quickly and the broadcasters had no problem finding alternative sponsorship.<sup>134</sup> It is also to be recalled that some of the more substantial sponsors (e.g., Xerox, A.T. & T., Hallmark, etc.) voluntarily limit the frequency of commercial interruptions and the separation rule would formalize this

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<sup>128</sup> See notes 13 and 126 *supra*.

<sup>129</sup> See note 13 *supra*.

<sup>130</sup> See authorities cited in note 126 *supra*.

<sup>131</sup> See note 126 *supra*.

<sup>132</sup> Even if it did have such an impact no serious constitutional issue would be presented. See, e.g., *Breard v. Alexandria*, 341 U.S. 622 (1951), where an ordinance against solicitations for magazine subscriptions was upheld even though this merchandising method accounted for between fifty and sixty percent of all subscriptions. Cf., authorities in note 74 *supra*.

<sup>133</sup> For example, FCC figures for 1972 show that station and network revenues increased 15.6% and pretax profits 41.9% over 1971. *Dollars in TV*, BUSINESS WEEK, Aug. 25, 1973, at col. 6. See also Cohen, *Advertising Boom Starting Now; Will Go Five Years*, ADVERTISING AGE, Aug. 7, 1972, at 1; and *TV Networks' Sales to Advertisers Did Well for First Half of 1974, Will There Be Rerun?*, Wall Street Journal, Jan. 30, 1974, at 30, cols. 1-3.

<sup>134</sup> *How Will Television Feel After It Gives Up Smoking*, FORTUNE, Jan. 1971, at 85-90, 136-39. See also note 133 *supra*.

good practice, thus reversing the Gresham law which pushes for more overcommercialization.

Second, the regulation will provide a strong incentive to the ad agencies to make the commercials more appealing rather than depending on the drilling effect of the repetition and incantation of banalities. The Italian experiment with a program of bunched-up commercials on television for twenty minutes during prime time called the "Carosello" is noteworthy. The advertisers had to come up with matter which would attract the audience on its own merits and they were so successful that the Carosello is one of the most watched programs.<sup>135</sup>

The proposed separation rule, unfamiliar as it may currently be in the United States, at least in common media programming,<sup>136</sup> coupled with frequency and duration limitations, is quite common in European broadcasting. For example, in addition to the Italian Carosello, the recently introduced commercials on French television are concentrated and delivered only twice during the evening hours for no more than a total of eight minutes per night.<sup>137</sup> In Germany, the

<sup>135</sup> M. MAYER, ABOUT TELEVISION 10, 397 (1972); *The Art of Selling*, NEWSWEEK, Dec. 20, 1971, at col. 1; and ASPECTS OF TELEVISION IN WESTERN EUROPE: *A Report by Representative Celler to House Judiciary Comm.*, 86th Cong. 1st Sess., at 15-16 (1959) [hereinafter cited as CELLAR REPORT]. Commercials are also allowed on the first channel at some other times but under major time and interruption restrictions. On the second channel, only one commercial interruption per day is permitted.

For a detailed description of the Italian system, including advertising practices, see B. PAULU, RADIO AND TELEVISION BROADCASTING ON THE EUROPEAN CONTINENT 102-104 (1967); STEIS, AN ANALYSIS OF RAI-RADIO-TELEVISIONE ITALIANA: THE ITALIAN BROADCASTING SYSTEM 194-206 (Ph. Dissertation 1969).

<sup>136</sup> But see the early recommendation of the private Commission on Freedom of the Press in favor of the establishment of "the practice of separation of advertising from programs (this is not to prevent the selling and programming of unrelated advertising announcements preceding or following programs)." L. WHITE, THE AMERICAN RADIO viii (1947).

To the effect that the public will strongly support separation of broadcast commercials from other content, especially the elimination of program interruptions, see R. BAUER & S. GREYSER, *supra* note 5, at 238, 373. Mayer also proposes government restrictions on commercial time and interruption on the broadcast media. M. MAYER, *supra* note 135, at 597. Probably the most restrained and acceptable practice is to use one-line credits at both ends of a long program, as is done in sponsor-supported programs on public TV.

In view of the recent pressure for better children programming practices, some stations, including the Post-Newsweek ones, are clustering commercials at the opening and closing of programs. See Lee, *Inquiry into Children's Programming—A Call for Action?* 47 NOTRE DAME LAW. 230, 243 (1971). This conforms to the recommendations contained in the report prepared by the White House Conference on Children in 1971. N.Y. Times, June 7, 1971, at 66, col. 7-8.

In the recent FCC *Children's Television Report and Policy Statement*, *infra* n. 161, the FCC postponed consideration of a "clustering" rule. *Id.* at 1246, n.18. Commissioners Hooks and Washburn, however, in their separate statements, argued in favor of such a rule to become effective immediately. *Id.* at 1252, 1253.

<sup>137</sup> M. MAYER, *supra* note 135, at 10.

Netherlands, Finland, and Switzerland broadcasting law and practice exclude commercial interruptions during programs and restrict the total number of interruptions, leading to excellent separation.<sup>138</sup> British commercial television is also subject to important and severe limitations on the interruptiveness of commercials.<sup>139</sup> In Canada, the Canadian Radio-Television Commission recently issued a 150-page report indicating that it intends to condition renewal of licensing on substantial reduction of advertising time.<sup>140</sup> The use of the European model of good advertising practices with proper adjustments has already been suggested,<sup>141</sup> and the time for action is now.

It should also be pointed out that a beneficial side effect of the separation rule would be that sponsors would tend to have less interest in and control over programming since their pitches would not be as often and as clearly identified with particular program offerings. Sponsor interference not only leads occasionally to ridiculous results,<sup>142</sup> but also has tended to support blandness, inoffensiveness, and appeal to the lowest common denominator at the expense of quality, controversial, and public interest programming.<sup>143</sup>

Finally, a word on a technical distinction. The separation rule presupposes that there are ways of defining what constitutes advertising. In the overwhelming majority of instances, there is no ambiguity in this area, but there may be some borderline cases. For example, what portion of the program content of "Let's Make a Deal," where particular products contributed by the sponsors are used as part of the game, would fall within the definition of a commercial?<sup>144</sup> To

<sup>138</sup> B. PAULU, *supra* note 135, at 98-109.

<sup>139</sup> Under the original Television Act of 1954 which governed commercial television, advertisements had to be placed only at the beginning or the end of programs or at natural breaks in them. See P. LANGDON-DAVIES, *MODERN ADVERTISING LAW* 82-87 (1963); CELLAR REPORT, *supra* note 135, at 4-12; 110 Cong. Rec. 3881 (1974).

The Television and Sound Broadcasting Acts of 1964 and 1972, which superseded the 1954 Act, retained these provisions. The Advertising Advisory Committee set up under these Acts has promulgated rules specifying what constitutes a "natural break" between programs, in substance not permitting more than an average of three intervals per broadcast hour. INDEPENDENT TELEVISION AUTHORITY, 1973 GUIDE TO INDEPENDENT TELEVISION 213-15, 219.

<sup>140</sup> *Canada May Place Restrictions on Children's Fare, Commercial Totals*, BROADCASTING, April 8, 1974, at 23-24.

<sup>141</sup> See, e.g., MAYER, *supra* note 135, at 397; and CELLER REPORT *supra* note 135, at 16-18.

<sup>142</sup> See Blalock, *Television and Advertising*, 28 FED. B.J. 341, 342-43 (1968). See also note 32, *supra*.

<sup>143</sup> See Cohen, *The Advertiser's Influence in TV Programming*, 3 LAW & SOC. ORDER 405-22 (1970); and Johnson, *Freedom to Create: The Implication of Antitrust Policy for Television Programming Content*, 1970 LAW & SOC. ORDER 337, 347-67.

<sup>144</sup> On this particular program, see Wall Street Journal Oct. 22, 1972, at 1, col. 4.

some extent, evasion or avoidance of the rule would be inevitable, much like today when a brand name or product is mentioned or shown in a play or in a talk program or when a cigarette manufacturer sponsors an athletic event which is shown on television. The FCC has already dealt with some more obvious subterfuges, such as the presentation of a real estate commercial program as a public service discussion,<sup>145</sup> and some workable practice may be developed.

### C. *Print Media*

In the context of the press, the separation rule would call for approaches that are already followed to some extent by some media on a voluntary basis. Periodicals should be required to bunch up all their advertising at the beginning and end, as is already done by magazines such as *National Geographic*, *Scientific American*, *Foreign Affairs*, etc. This would not be too radical in view of the fact that a substantial portion of magazine ads appear full-page anyway.<sup>146</sup> A comparable requirement should apply to book inserts.

Newspapers already bunch up all their classified advertising and advertising supplements are on the upswing for economic and efficiency reasons.<sup>147</sup> Furthermore, full-page ads, especially for local advertisers appear to be on the rise.<sup>148</sup> Extending full separability of advertising to newspapers should not therefore be onerous. On the contrary, separation may provide an incentive to newspapers to adopt the practice of classifying all advertising by categories and indexing the ads for the convenience of the reader.

Purely commercial publications, of course, would not be affected at all. For example, *Sears*, *Penney's*, and *Ward's* may continue print-

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<sup>145</sup> *In re WUAB, Inc.*, 37 FCC2d 748 (1972). See also *Wall Street Journal*, Feb. 26, 1973, at 21, col. 6.

<sup>146</sup> For example, more than half of the total pages of the *NEWSWEEK* editions for April 15 and April 29, 1974 were full page ads.

<sup>147</sup> For example, in 1971 the *New York Times* carried a record 121 ad inserts, up from 73 in 1970. *National Preprint Corporation*, which specializes in this field, predicted that in 1971 the nation's newspapers would carry 25% more ad inserts than in 1970. *Stuffed Newspapers: Ad Inserts Gain Ground at a Rapid Clip*, *Wall Street Journal*, Nov. 18, 1971, at 1, col. 5. This prophecy was overfulfilled: "pre-prints," as they are sometimes called, soared to 10 billion in 1971 from 7.5 billion in 1970. *Insert Advertisers Warn Newspapers Against Mounting Costs of Reprints*, *ADVERTISING AGE*, June 19, 1972, at 22. Not only are pre-prints less intrusive (see, e.g., *Preprinted Ad Inserts Raise Few Objections*, *EDITOR & PUBLISHER*, Dec. 11, 1971, at 52), but they are significantly more effective than regular newspaper ads. *Stuffed Preprints vs. ROP-How Coupon Response Varies*, *EDITOR & PUBLISHER*, Jan. 15, 1972, at 18. (3.7 times more effective).

<sup>148</sup> For example, the *New York Times* edition of Sunday, April 28, 1974, contained 132 full-page ads out of 365 pages, excluding the real estate, employment, classified, and comparable sections.

ing and distributing their useful catalogues without interference. Unsolicited or junk commercial mail would also remain unaffected, subject possibly to a labelling requirement. It would seem that the decisive factor should be not whether the particular publication is sold or distributed free of charge but whether the publication contains both editorial and commercial matter. In defining what constitutes "commercial matter" one would need to go beyond pure product advertising, for example, to include company advertising and all commercial material written or controlled by a paying sponsor. Within the advertising section or supplement, the publisher should be unfettered in his discretion on placement.

#### IV. HOW TO PUT THE SEPARATION RULE INTO EFFECT—OF LEGISLATIVE, JUDICIAL, AND ADMINISTRATIVE AVENUES

Accepting that commercial-content speech enjoys limited, if any, first amendment protection and that the commercial practices of the media are subject to business regulation, is there anything in the proposed rule of separation which would go beyond the commercial limits and raise a constitutional problem? In a recent Supreme Court case, *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*,<sup>149</sup> the constitutionality of legislation outlawing employment advertising by sex categories was challenged on the first amendment ground that the statute interfered not merely with the advertising itself but with the *editorial* function of the publisher in deciding where to place what matter. This distinction, which would have cast some doubt on the constitutionality of the rule of separation at least for the print media, was rejected by the majority of the Supreme Court and appears to have been laid to rest.

##### *A. The Legislative Front: An Open Horizon With Political Problems*

Granted that no statute presently in the books strikes directly at intrusive advertising, there is little doubt that, in the exercise of its commerce power, the Congress could enact legislation imposing the rule of separation upon the entire broadcast industry and at least the interstate print media. The states also could adopt adequate statutes for the intrastate media such as purely local newspapers. This is the best way to ensure unambiguous, long-lasting results, assuming that sufficient political support could be mustered in favor of such legislation. There is no use denying, however, that the legislative struggle

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<sup>149</sup> 413 U.S. 376 (1973).

will have to be waged against determined and unyielding media and business opposition and that only a major coordinated effort by consumer and public interest groups may have any chance of success.

A particularly helpful analogy is presented by the federal anti-trust legislation which outlaws the so-called "tying arrangement" involving suppliers of commodities who enjoy a monopolistic position for the "tying" product or situations where a substantial volume of commerce in the "tied" product is restrained. In such instances, it is illegal to force the tied commodity upon the buyer as a condition of selling to him the tying commodity.<sup>150</sup> Some of these arrangements are also vulnerable to attack under §§ 1 and 2 of the Sherman Act.<sup>151</sup> One of the objectives of this legislation is to preserve for the buyers the freedom of choice of not buying the tied product from the supplier.<sup>152</sup> In an interesting case involving newspaper advertising, *Times Picayune Pub. Co. v. United States*,<sup>153</sup> the Supreme Court considered an antitrust challenge to a practice whereby buyers of advertising space in the morning paper were required to run the ad also in the afternoon paper. Even though advertising was viewed purely as a commercial endeavor involving the selling of "readership" and no doubt was expressed on the legislature's power to invalidate the challenged practice, the Court found for the defendant principally on the technical ground that monopolistic leverage and a tied second distinct commodity were absent.

While the antitrust laws in their current form concededly do not reach the foisting of advertising messages upon unwilling audiences as described in this article, the tie-in legislation is on point because it protects the buyer's freedom of choice by limiting the seller's options in marketing products as a package. Since intrusive advertising most often appears inextricably attached to other matter, the rule of separation may reasonably be viewed as aiming at "untying" the knot in the public interest.

### B. *The Limited Role of The Courts*

It is rather clear that a purely judicial approach, relying on presently recognized constitutional, legislative, or common law principles in support of separation is not likely to bear fruit. This does

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<sup>150</sup> Clayton Act § 3, 15 U.S.C. § 14 (1971).

<sup>151</sup> 15 U.S.C. §§ 1 and 2 (1971).

<sup>152</sup> THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 138-39 (1955); Pearson, *Tying Arrangements and Antitrust Policy*, 60 NW.U.L. REV. 626, 632-38 (1965).

<sup>153</sup> 345 U.S. 594 (1953).

not, of course, mean that concepts of privacy, nuisance, and public interest in the media do not provide analogies or supporting reasons but only that, at the present time, there is no recognized cause of action which could be expected to bring about adequate relief.

### C. *The FTC and FCC Possibilities*

The Federal Trade Commission remains unchallenged as the main watchdog agency over advertising abuses. While the FTC's powers over unfair trade practices, including advertising, had been earlier limited to those that adversely affected competition,<sup>154</sup> the Wheeler-Lea Amendments of 1938 to the Federal Trade Commission Act placed beyond dispute the commission's authority to take the interests of consumers into account in enforcing the law.<sup>155</sup>

Given the broad language of § 5 of the Federal Trade Commission Act proscribing "unfair or deceptive acts or practices,"<sup>156</sup> and the interpretation of this language by the courts, there appears to be no formal obstacle to an FTC crusade against advertising intrusion.<sup>157</sup>

A review of the record, however, fails to produce even a single instance of FTC action even remotely related to the intrusive element in advertising. More pessimistically, the recent in-depth FTC hear-

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<sup>154</sup> The original version of the Federal Trade Commission Act did not explicitly empower the FTC to deal with advertising, but referred generally to "unfair methods of competition." In interpreting the Act, the Supreme Court focused on the protection of competitors rather than consumers. *FTC v. Radam Co.*, 283 U.S. 643 (1931).

<sup>155</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972).

<sup>156</sup> 15 U.S.C. § 45 (a)(1) (1971).

<sup>157</sup> As already indicated in the text, Section 5 of the Act refers to "unfair or deceptive" acts. The power of the FTC to deal with aspects of advertising other than falsity or deception has not been seriously challenged. On the contrary, the Supreme Court itself has endorsed what has been called the "unfairness doctrine," i.e., FTC authority to prohibit practices which are neither deceptive nor anti-competitive but which "offend public policy" by being outside the penumbra of some established "concept of unfairness," which are "oppressive or unscrupulous," or which cause "substantial injury to consumers." *FTC, Statement of Basis and Purpose of Trade Regulation 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324, 8355 (1964), quoted with approval in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45, n. 5 (1972). On the "unfairness doctrine," which so far has been aimed at advertising not false in itself but made to appeal to the emotions and desires of the consumer or at advertising which is unsubstantiated, see Isaacs, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WIS. L. REV. 1071-96; Thain, *Advertising Regulation: The Contemporary FTC Approach*, 1 FORD. URB. L.J. 349, 367-81 (1973); and Note, *Unfairness in Advertising: Pfizer, Inc.*, 59 VA. L. REV. 324-54 (1973).

On the FTC authority and actual operations in the area of advertising, see generally *Symposium: FTC Regulation of Advertising*, 17 KANS. L. REV. 551-650 (1969); Millstein, *The FTC and False Advertising*, 64 COLUM. L. REV. 439 (1964); and Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005-1163 (1967).

ings on the entire subject of advertising<sup>158</sup> evidence no particular concern for the consumer's plight as captive audience of advertising imposition.<sup>159</sup>

The recent frustrating experience of Action for Children's Television (ACT), a public interest group based in Boston, demonstrates the reluctance of the appropriate federal agencies to take strong measures against advertising which does not fall within the basic contours of deception.<sup>160</sup>

In 1970, ACT started its campaign by formally petitioning the Federal Communications Commission to ban commercials on children's television programs and to require stations to provide at least fourteen hours of children's programming per week. The FCC, by a vote of four to three, treated this petition as a request for new regulations, invited comments, and held hearings in 1972 and 1973.<sup>161</sup> Over 100,000 letters, comments, and supporting statements mostly favoring the ACT proposal were received.<sup>162</sup> At long last in late 1974, the FCC came out with a *Children's Television Report and Policy Statement* which essentially relies on industry self-regulation to take care of some of the abuses.<sup>163</sup>

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<sup>158</sup> The FTC held hearings for five weeks beginning October 21, 1971 to obtain information on modern day advertising techniques and on how these may effect the agency's regulatory responsibilities. The hearings centered on consumers' physical, emotional, and psychological responses to advertising and the impact of advertising on children. See *FTC to Study How Ads on TV Affect Consumers*, Wall Street Journal, May 13, 1971 at 5 col. 2.

<sup>159</sup> The author has examined the full transcript of the hearings, which is available at the offices of the agency, as well as a summary of the hearings prepared in the form of a mimeographed study by Howard & Hulbert, *Advertising and the Public Interest: A Staff Report to the Federal Trade Commission* (1973). The author found no testimony directly related to advertising intrusion except some references to the television audience as captive (testimony by Krugman, at 204 of the transcript) and an incidental recommendation "to cut down on the number of commercials, the time they consume and particularly their intrusiveness" (testimony by Brazelton, at 1266 of the transcript). Howard and Hulbert specifically state that "we do not believe problems of intrusiveness and clutter should be dealt with by the Commission" (at IX-40). In evaluating the recommendations contained in this study, it should be noted that Mr. Hulbert has served as vice president for public relations of the National Association of Broadcasters.

<sup>160</sup> See note 3, *supra*.

<sup>161</sup> Lee, *supra* note 136, at 230-46. For a more detailed description of the FCC response to the ACT petition, see FCC, *Children's Television Report and Policy Statement*, FCC 74-1174, 31 P. & F. RADIO REGULATION 2d 1228, 1230-32 (1974). See also, Steinberg, *The FCC as Fairy Godmother: Improving Children's Television*, 21 U.C.L.A. L. REV. 1290, 1292-94 (1974).

<sup>162</sup> Howard & Hulbert, *supra* note 159, at VI-30.

<sup>163</sup> *Supra* note 161. In the *Report and Policy Statement*, the FCC rejected the ACT proposal to eliminate all sponsorship on programs designed for children, principally because of the damaging effect that such elimination would have on the amount and quality of such programs by depriving them of needed revenues. Noting that the National Association of Broadcasters agreed to amend its code to limit the hourly



In view of the FCC's foot-dragging, Act in late 1971 turned to the FTC and sought lesser and more particular relief — a ban on vitamin, drug, toy, and food ads on children's television programs, on the ground that such ads, as measured against children's abilities to understand and comprehend, are "unfair" as manipulative and deceptive.<sup>164</sup> The October 1971 FTC hearings had already provided ample evidence of advertising abuses on children's television and had raised serious questions on the pitfalls inherent in advertising to children.<sup>165</sup> Again, however, no clear-cut action emerged. The only reported action following the hearings has been a proposal for a meeting of FTC personnel with representatives of advertising, broadcasting, and consumer interests to try to develop a voluntary TV code "spelling out what is and what isn't acceptable" in children's ads.<sup>166</sup> In early 1974, the battle was reopened again when six consumer organizations asked the FTC to ban all advertising on or adjacent to programs designed for children under 12. Another round of meetings has been scheduled and what action if any may finally be taken is anybody's guess.<sup>167</sup>

While it is true that the ACT effort, as well as the public television competition, have produced some improvement in children's television programming and advertising,<sup>168</sup> the fact remains that a

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time devoted to non-program material on children's programs and that the Association of Independent Television stations agreed to comply with these limitations, the FCC chose not to adopt related rules, postponing action until it had the opportunity to assess the effectiveness of these voluntary measures. *Id.* at 1240-42. The FCC also declined to require "clustering" of commercials although it indicated that it might give further consideration to this matter in the future. *Id.* at 1246, n. 18.

*Children's TV To Get A Scanning By FCC In Study of Quality*, Wall Street Journal, Jan. 22, 1971, at 10, col. 2. See also, Lee, *supra*, note 136; Charlton-Perrin, *How Not to Sell to Children on TV*, N.Y. Times, Aug. 22, 1971, § 3, at 17, cols. 105. The FCC held hearings in 1973 on the Act petition, Columbus (Ohio) Dispatch, Feb. 4, 1973, at 31, cols. 6-8, but no action appears to have been taken as of this time.

<sup>164</sup> *Group Bids FTC Bans Ads on Children's TV*, N.Y. Times, Dec. 7, 1971, at 94, cols. 6-8.

<sup>165</sup> Testimony summarized and authorities cited in Howard & Hulbert, *supra* note 159, at VI-2 to VI-32. While the issues are not entirely uncontroversial, the evidence supporting ACT's arguments is overwhelming.

<sup>166</sup> *FTC Chairman Says A TV Code is Needed to Guide Advertising Directed at Children*, Wall Street Journal, Aug. 7, 1973, at 4, cols 3-4. Howard & Hulbert, *supra* note 159, at IX-8 to IX-12, recommend some ameliorative changes for children's television programming but not a total ad ban or any other major measures.

<sup>167</sup> *Advertising: Children's Crusaders*, NEWSWEEK, Feb. 4, 1974, at 69, cols. 2-3. *Children's TV Back to a Boil Among Medium's Priorities*, BROADCASTING, April 8, 1974 at 20-22. In May 1974, new FCC Chairman Wiley forecast FTC action to reduce the number of interruptions. BROADCASTING, May 27, 1974, at 6.

<sup>168</sup> Wall Street Journal, Sept. 10, 1971, at 1, col. 1; N.Y. Times, May 31, 1971, at 1, col. 4. Most of the changes, however, have been minor. For example, following the ACT complaint, vitamin ads were dropped. Wall Street Journal, Aug. 7, 1973, at 4, cols. 3-4.

great deal remains to be done and that the progress made so far is easily reversible.

The ACT case shows clearly that when the industry opposes certain action, both the FTC and the FCC tend to temporize and to rely on self-regulation and on promises of self-improvement rather than take decisive action even when the record is clear and the remedy apparent.<sup>169</sup> This is particularly egregious in the case of the FTC where no serious question of authority is involved.<sup>170</sup>

#### D. The FCC—Past, Present, and Future

The days of early radio regulation when Secretary of Commerce Herbert Hoover dreamed of airwaves free of commercialism<sup>171</sup> appear remote indeed. The broadcast media are decidedly commercial and the FCC has accepted this as a fact of life.<sup>172</sup> Except for some rare and timid concern over excessive commercialization expressed in license renewal proceedings,<sup>173</sup> and except for a valiant but abor-

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<sup>169</sup> A recent comparative study cited in Lee, *supra* note 136, at 235, n. 31, involving Western Europe, Canada, and Japan, indicates that most countries have no advertising on children's television. In nine countries where such advertising is allowed, substantial restrictions prevent abuses. Powell, *Protection of Children in Broadcast Advertising: The Regulatory Guidelines of Nine Nations*, 26 FED. COMM. BAR J. 61-75 (1973).

<sup>170</sup> As already indicated, the FTC powers over advertising are broad and comprehensive. Note 157, *supra*. It is noteworthy that FTC authority to ban advertising completely from children's programs, as petitioned by ACT, has not been questioned. The courts generally are reluctant to get involved in the informed work of agencies acting within the scope of their authority. As stated in *Bankers Securities Corp. v. FTC*, 297 F.2d 403, 405 (3rd Cir. 1961):

[A] court should not interfere with the informed judgment of an administrative body . . . in evaluating the impact of advertising practices and in framing equitable advertising requirements that serve the public interest.

<sup>171</sup> Address at the First Annual Radio Conference in 1922, 1 P. & F., RADIO REG. 2D 1607 (1964).

<sup>172</sup> "Advertising must be accepted . . . as the sole means of support of broadcasting, and regulation must be relied upon to prevent the abuse or over use of the privilege." *Great Lakes Broadcasting Co.*, quoted with approval in the FCC Notice of Proposed Rule Making, FCC 63-467, 28 FED. REG. 5158 (1963). See also, Blalock, *Television and Advertising*, 28 FED. B.J. 341 (1968).

For a good review of past F.C.C. practice with respect to advertising abuses see *Head v. Board of Examiners*, 374 U.S. 424, 437-41 (1963).

<sup>173</sup> With the exception of a couple of early instances of refusal to renew radio licenses, principally for overcommercialization (*R.R. Jackman*, 5 F.C.C. 496 (1938)), the FCC's actions in this area have been no more than slaps on the wrist. In a few cases, comparative demerits were given because of overcommercialization (*Sheffield Broadcasting Co.*, 21 P. & F. RADIO REG. 507 (1961); and *Fischer Broadcasting Co.*, 19 P. & F. RADIO REG. 997 (1961)). In other cases, renewal applications were granted for less than the full period (*Miss. Ark. Broadcasting Co.*, 22 P. & F. RADIO REG. 305 (1961); *Gordon County Broadcasting Co.*, 24 P. & F. RADIO REG. 315 (1962); and *Kord, Inc.*, 31 F.C.C. 85 (1961)). See also *Bay State Beacon, Inc. v. F.C.C.*, 171 F.2d 826 (D.C. Cir. 1948), sustaining the Commission's refusal to grant a new frequency to a broadcaster with a record of excessive emphasis of commercials. On the failure

tive effort in 1963-1964 to impose some compromise limitation on commercial time, the FCC has essentially kept its distance and commercialism has developed rampant and unfettered on the airwaves. The 1963-1964 story deserves closer scrutiny not only for a better understanding of the FCC *laissez-faire* attitude but also to gain an appreciation of the formidable power of the industry in the Congress.

In a Notice of Proposed Rule Making, adopted May 15, 1963, by a 4-to-3 vote,<sup>174</sup> the FCC stated that the case by case treatment of overcommercialization in license renewals had not been satisfactory and, expressing grave concern over advertising excesses, proposed to adopt rules limiting the total amount of commercial time permissible on radio and television. Essentially, the FCC proposed to adopt the standards of the Radio and Television Codes of the National Association of Broadcasters. Following strong opposition by broadcasters, and ominous rumblings in the Congress, and despite the overwhelming support shown by members of the public, the FCC retreated in early 1964 and shelved the proposed rules.<sup>175</sup> While insisting (a) that the proposed rules would not be unconstitutional or unlawful interference with or censorship of programming, (b) that the FCC has ample authority to adopt rules against overcommercialization under sections 303(b), 303(g), and 303(r) of the Communications Act, (c) that the proposed rules would not constitute undue intrusion into private enterprise, tend toward public utility regulation, or have adverse economic effect on some stations, and (d) that "the total time consumed by broadcast advertising and the extent to which such advertising is permitted to interrupt programming are two major facets of the problem of overcommercialization," the FCC nevertheless decided that the adoption of definite standards was not appropriate at that time, citing the need for more information and study of the problem of commercial interruption.<sup>176</sup> In the meantime, the FCC stressed that it would give "closer attention to the subject of commercial activity by broadcast stations" and would take into account the number and frequency of commercial announcements in the evaluation of overall station performance.<sup>177</sup> There is little doubt that the gathering storm

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of the Commission, following the 1963-64 unsuccessful attempt at rule-making, to carry through its threat of increasing vigilance over overcommercialization in renewal proceedings, see note 177 *infra*.

<sup>174</sup> FCC 63-467, 28 Fed. Reg. 5158 (1963).

<sup>175</sup> FCC 64-22, 1 P. & F., RADIO REG. 2D 1606 (1964).

<sup>176</sup> *Id.* at 1607-10.

<sup>177</sup> *Id.* at 1610.

Despite this commitment to use license proceedings as a handle for some control over advertising excesses, the FCC has continued the practice of almost routine wholesale renewals without much investigation. *Commercial Practices of Broadcast Licenses* 2 P. & F., RADIO

in the House of Representatives and the divisions in its ranks played a major role in this FCC about face.<sup>178</sup>

On August 30, 1963, Representative Rogers of Texas introduced a bill in the House Committee on Interstate and Foreign Commerce to amend the Communications Act of 1934 to prohibit the FCC from making rules relating to the length or frequency of broadcast advertisements. The bill was referred to the Subcommittee on Communications and Power, which Rogers chaired. Hearings were conducted, and eventually the bill was approved by the full committee, with eight members dissenting and filing a minority report. The bill was then introduced in the House as H.R. 8316, and on February 27, 1964 it was adopted by a vote of 317 to 43.<sup>179</sup> The bill subsequently died without going to the Senate. In addition to a vague charge that the proposed FCC rules would constitute interference with programming and censorship in violation of the Constitution and the Communications Act,<sup>180</sup> the main arguments against the FCC proposal may be summarized as follows:

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REG. 2D 885 (1964) (Chairman Henry and Commissioner Cox dissenting). The Henry-Cox dissent is worth quoting:

For over thirty years, this agency has told the Congress and the public that it is alert to the problem of overcommercialization in broadcasting. We have said that, wherever and whenever the public's program service is suffering because of incessant intrusions from advertising, we will take effective action.

*Id.* at 885 (*emphasis supplied*). In 1970, following informal hearings, the FCC adopted a policy requiring full license renewal hearings for stations which exceed the National Association of Broadcasters limits on commercials (18 minutes per hour for radio, 10 (prime time) and 16 (other) minutes per hour for television). Wall Street J. *supra* note 13, at col. 1. *See also Hearings on TV Ads Inconclusive; More Sessions Needed*, Wall Street Journal, March 16, 1970, at 6, col. 4. There is no indication of any significant progress having been made under this new policy as of this time.

<sup>178</sup> *See* EMERY, BROADCASTING AND GOVERNMENT 326 (1961); E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 108-09 (1973).

<sup>179</sup> The full text of H.R. 8316, its legislative history and the transcript of the debate in the House appear in 110 CONG. REC., 3869-3910 (1964).

<sup>180</sup>

#### *Constitution*

- (1) Rep. Avery (bill goes to very issue of free speech itself). *Id.* at 3870.
- (2) Rep. Kornegay (FCC is becoming a thought-control agency). *Id.* at 3890.
- (3) Rep. Dorn (remember Goebbels; no censorship and broadcaster control should ever come to U.S.). *Id.* at 3896.
- (4) Rep. Clausen (the first step toward totalitarian government is to control the news media). *Id.* at 3896.
- (5) Rep. Cunningham (if they go ahead with interference into programs, this will interfere with our freedom of speech). *Id.* at 3901.
- (6) Rep. Schwengel (this type of regulation places a limitation upon free speech because advertising is a form of free speech). *Id.* at 3906.

#### *Communications Act of 1934*

- (1) Rep. Avery (unlawful control of programming). *Id.* at 3869.
- (2) Rep. Schwengel. *Id.* at 3907.

(a) The FCC had no power to adopt advertising rules under the Communications Act as this would constitute usurpation of the legislative authority of Congress.<sup>181</sup>

(b) The FCC action was tantamount to regulating the broadcasters as common carriers which was not permissible under the Communications Act.<sup>182</sup>

(c) Economic regulation of the broadcast media was not contemplated by the Communications Act and is inconsistent with private enterprise.<sup>183</sup>

(d) The proposed rules would work the financial ruin of many broadcasters.<sup>184</sup>

(e) Advertising abuses are not susceptible to treatment by means of broad rules and there are so many differences among stations and operating conditions that general rules are apt to work injustices.<sup>185</sup>

(f) The industry could take care of abuses through self-regulation.<sup>186</sup>

(g) The public could protect itself against overcommercialization by switching channels or turning the television off.<sup>187</sup>

<sup>181</sup>

(1) Rep. Skubitz. *Id.* at 3870.

(2) Rep. Rogers. *Id.* at 3874.

(3) Rep. Hutchinson (it is not often that we have the opportunity to shorten the long arm of bureaucracy and to reclaim for the Congress the legislative power of the United States). *Id.* at 3895.

It is also to be noted that in *House Committee on Interstate and Foreign Commerce, Lack of Authority of Federal Communications Commission to Make Rules Relating to the Length of Frequency of Broadcast Commercials*, H.R. REP. NO. 1054, 88th Cong., 1st Sess. at 6 (1963), a 1927 response of the then Radio Commission was quoted to the effect that new legislation was needed to empower the Commission to "reduce, limit and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain percent of the total time." Even if this premise were true, however, it would not by its own terms apply to the "separation rule" proposed in the present article.

<sup>182</sup> Rep. Rogers. *Id.* at 3873.

<sup>183</sup>

(1) Rep. Cunningham. *Id.* at 3871.

(2) Rep. Harris. *Id.* at 3872, 3897.

(3) Rep. Broyhill. *Id.* at 3877.

(4) Rep. Shriver. *Id.* at 3878.

(5) Rep. Libonati. *Id.* at 3893.

<sup>184</sup> Rep. Short. *Id.* at 3876-7.

<sup>185</sup> See also H. R. Rep. No. 1054, *supra* note 180, at 6.

<sup>186</sup> See also H.R. REP. NO. 1054, *supra* note 180.

<sup>187</sup>

(1) Rep. Avery (if radio or TV is overcommercialized, you shut it off). *Id.* at 3870.

(2) Rep. Dole, quoting from broadcaster's comment (public may flip the dial, protect itself from too many commercials). *Id.* at 3870.

(3) Rep. Short (if commercial is too long, too loud or poor in quality, the private citizen can

Although the overwhelming sentiment in the House at that time was against the proposed FCC action, many eloquent voices rose to dispute the validity or applicability of the above arguments and there was also a great deal of articulation on the substantive evils of intrusive advertising.<sup>188</sup>

It would seem quite apparent that the FCC interpretation of its authority to adopt rules against overcommercialization is correct.<sup>189</sup> The arguments that time or frequency limitations on broadcast advertising constitute censorship unwilling, essentially captive audiences and that the FCC has no rule making power in this area are unconvincing.<sup>190</sup> Provided that the regulation involved does not destroy the

turn off the set or switch to another station). *Id.* at 3874.

(4) Rep. Libonati (all one has to do to escape the advertising media is to shut off the set). *Id.* at 3894.

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(1) Rep. Kilburn (people have no real choice when no non-commercial stations available). *Id.* at 3874.

(2) Rep. Joelson (if FCC does not regulate commercial time, it will not be too long before stations will be announcing "We are going to interrupt this commercial message for a brief program"). *Id.* at 3874, 3906.

(3) Rep. Moss (many commercial interruptions are an imposition on the viewing public, upon their time, and their homes; instance after instance of the most blatant type of commercial degradation). *Id.* at 3880, 3907.

(4) Rep. Celler (the "hucksters" cannot be permitted to run hog wild; seeing a frequently interrupted TV show is as unsatisfactory as kissing a girl through a handkerchief; the impact of overcommercialization falls upon what is virtually a captive audience; the public cannot escape the intrusive interruptions of commercials if they are to watch the program of their choice; broadcasters are making phenomenal profits, there is no risk of financial ruination through some regulation). *Id.* at 3881.

(5) Rep. Van Deerling (do not surrender America's living rooms still further to the hucksters). *Id.* at 3884.

(6) Rep. McDonald (millions of people are sickened, annoyed and generally agreed that there have been abuses in advertising). *Id.* at 3904.

(7) Rep. Gill (what today is more annoying than repetition and poorly executed commercials? What is more frustrating than to try to find a news broadcast buried under a cloud of indigestion nostrums; the listening and viewing public has been a neglected group). *Id.* at 3908-09.

<sup>189</sup> For a summary review of the FCC's powers over programming in general, especially in view of the *Red Lion* decision, see, *Memorandum to the Commission by Henry Galler*, its General Counsel, dated September 2, 1969, reproduced in 20 P. & F., RADIO REG. 2d 381-88 (1970). As it concerns advertising in particular, see also *FCC Children's Television Report and Policy Statement*, *supra* note 161, at 1238-1240, 1244; Steinberg, *supra* note 161, at 1310-14.

It is also quite noteworthy that in *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), the FCC regulations relating to over-the-air subscription television (STV), including a *total ban* of advertising (other than STV promotion), were upheld, and the Supreme Court denied certiorari, 397 U.S. 922 (1970).

<sup>190</sup> On the limited first amendment protection of commercial speech, see text at notes 35-61, *supra*. Cf. *State v. Rabe*, 79 Wis. 2d 254, 267, 484 P.2d 917, 924, *rev'd on other grounds* 405 U.S. 313 (1972); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1035 (1971).

broadcasting industry as private enterprise, there appears no support in the legislative history of the Communications Act for the proposition that the FCC may not take measures having some economic impact on the industry. The lack of similarity between the proposed FCC rules and public utility type regulation is too obvious to need elaboration. The ineffectiveness of self-regulation in this area is notorious and it appears possible to draft rules which will reasonably deal with the problem as a whole.

The arguments in favor of the authority of the FCC to take the action proposed in 1963 are a fortiori applicable to the "rule of separation" advocated in this article. Indeed this rule should be less objectionable to the industry since it contains no absolute commercial time limitations and is also better tailored to the need to protect the audience against unwanted commercial exposure.

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According to Robinson, *supra* note 115, at 110-11:

Even if commercial advertising were within first amendment protection, it is doubtful whether those of the Commission's regulatory actions which impose *direct* restraints on advertising practices involve serious encroachment on such first amendment protection as is accorded to advertising. Curbs on overcommercialization . . . seem generally justifiable in the context of radio and television to the same extent they are in comparable situations outside the field of radio and television.

In the Communications Act of 1934, the FCC is given broad powers, including rule-making powers, to regulate the broadcast media in the "public interest, convenience and necessity," which would amply cover reasonable action against overcommercialization. In the key decision *National Broadcasting Co. v. United States*, 319 U.S. 190 (1942), the Court recognized that the act "puts upon the Commission the burden of the determining the composition of [the broadcast] traffic." *Id.* at 216. In another important case, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289 (1954), the Supreme Court stressed that "the Commission would be remiss in its duties if it failed . . . to aid in implementing the statute, either by general rule or by individual decisions." In upholding the FCC's application of the fairness doctrine to cigarette commercials, the Court of Appeals for the District of Columbia Circuit cited *National Broadcasting*, and stated:

[I]n the context of the Communication Act as it has been long understood, we do not think that public interest ruling relating to specific program content invariably amount to "censorship" within the meaning of the Act.

*Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968).

The federal courts have also upheld FCC authority to regulate access to prime time on television despite the fact that it had an exclusory effect on certain programming. *N.A.I.T.P.D. v. FCC*, 43 U.S.L.W. 2445-6 (2d Cir. 1975); *Mt. Mansfield TV v. FCC*, 442 F.2d 470 (2d Cir. 1971). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 715 (1954). On the propriety of using license renewals to combat commercial abuses, see *Bay State Beacon, Inc. v. FCC*, 171 F.2d 826, 827 (D.C. Cir. 1948).

According to FCC Commissioner Lee, "[I]t would seem unwise to attempt to construe censorship in any broader terms than the deletion of specific material or the addition of specific material . . ." Lee, *supra* note 136 at 291.

The characterization of the proposed rules as program regulation is far-fetched and unconvincing, and even if the characterization were so, the proposed rules would not run afoul of the first amendment and § 326 of the act as censorship of protected speech because of the commercial nature of the speech involved.

One cannot but hope that the FCC, which appears to be the most appropriate agency to combat overcommercialization in the broadcast media, will recover from the traumatic experience of its 1963-1964 congressional confrontation and reconsider rule-making against advertising abuses, such as intrusion. In 1964, while expressing great concern over excessive advertising, the FCC adopted a wait and see attitude on the problem of commercial interruption, citing the need for a more extensive study.<sup>191</sup> In 1970, the FCC conducted informal hearings on broadcast overcommercialization but again with no visible results.<sup>192</sup> It is difficult to understand what is meant by the need for further study. If the FCC requires some sort of objective scientific proof that interruptive commercials damage the body or the psyche of many members of the public, it may have to wait for a long time. But such proof clearly should not be a *sine qua non* of FCC involvement. If the public overwhelmingly is annoyed by, and perceives that it wastes time and effort by reason of the intrusiveness of advertising, there is adequate basis for remedial action "in the public interest, convenience, and necessity" under the Communications Act.<sup>193</sup> Typical however, of the FCC's reluctance in this area is its rejection of a petition by a group called Termination of Unfair Broadcasting Excesses (TUBE), a group of George Washington University law students, advocating the adoption of a code for broadcast advertising practices.<sup>194</sup>

To be sure, whatever the merits of the arguments supporting FCC authority in this area, any FCC action is doomed to failure if there is substantial congressional opposition. The rise of consumerism in the last decade, however, and the increasing pressures on the Congress to safeguard the public interest against encroachment by any industry, however powerful, generate some optimism that a new FCC initiative will not trigger a repetition of the 1963-1964 experience.<sup>195</sup>

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<sup>191</sup> See note 176 *supra*.

<sup>192</sup> See Wall Street Journal, *supra* note 13, at cols. 1-4; Wall Street Journal *supra* note 177.

<sup>193</sup> See FCC, *Public Service Responsibility of Broadcast Licenses* 12, 40-44 (1946).

"If much of the offensiveness of commercials is derived from their frequency, there would appear to be a substantial public interest in reasonable regulation of air time devoted to advertising." Note, *Developments in the Law-Deceptive Advertising* 80 HARV. L. REV. 1005, 1013 (1967).

<sup>194</sup> N.Y. Times, Oct. 30, 1971, at 64, cols. 3-8.

<sup>195</sup> That the broadcasting lobby remains powerful, however, cannot be gainsaid. For example, it was recently successful in knocking out a provision in the proposed legislation to set up a new federal consumer agency, which would have permitted the agency to intervene in broadcast license renewals. Consumer-Panel Role in Broadcast Renewals Barred by Senate Vote, Wall Street Journal, May 9, 1975.



## V. CONCLUSION

The fact that advertising at its best plays some useful role in our economy is no reason why advertising's more blatant excesses should not be regulated in the public interest. While the price that each one of us pays for advertising intrusion may be small, the fact that the intrusion is universal, continuous, and expanding provides more than ample justification for measures to maximize individual choice to be free from advertising. In no other country in the world has advertising been allowed to become so burdensome and pervasive against an essentially defenseless population. Intrusive overcommercialization and the propagandizing of unwilling, essentially captive audiences is a tyranny that need not be endured provided that there is a will to take the simple basic step of separation. The proposed rule which would require the media to take reasonable measures to segregate advertising from non-advertising matter would go a long way in protecting the public interest without unduly burdening the industry or the sponsors.

It has been demonstrated that there are no constitutional barriers to such regulation, that legislation could directly achieve the desired result, and that certain administrative agencies have the power and authority under existing legislation to adopt measures which could bring about major improvements in this field.

Hopefully, increasing awareness of the need to protect the public interest against private encroachment and the need to strengthen the position of the individual as a consumer and as a free person will generate sufficient pressure and momentum for overdue action against the hucksterism that takes a toll of us all.

